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CONTRACT THEORIES AND THE RISE OF NEOFORMALISM

John E. Murray, Jr.*

I. CHALLENGES TO NEOCLASSICAL THEORY

The promise of multidisciplinary influences in legal academic literature over the last three decades signaled the recognition of important theoretical dimensions that could inform legal doctrine.¹ The product of the new theorists, however, was often seen as a diverse assortment of intellectual frolics by academic lawyers that largely ignored legal doctrine or denigrated it as a collection of indeterminate norms.² Beyond its potentially negative effects on legal education and

* Chancellor and Professor of Law, Duquesne University. Former President, Duquesne University and former Dean of the University of Pittsburgh and Villanova University Schools of Law. While it is important to emphasize that Professor Joseph Perillo is not responsible for any of the views contained in this article, I am pleased to recognize his enormous contribution in a lifetime of contracts scholarship to law students, the bench, the bar, to me and to other scholars. His vast writings display meticulous research and invaluable insights deserving a major place in the history of contracts scholarship. He writes without guile and with a total commitment to the enhancement of justice as a distinguished member of the academic bar.

1. These are times of ferment in legal academia. Standard doctrinal analysis, which all but occupied the field a decade ago, is now retreating before the onslaught of all sorts of fancy new techniques. Strange-sounding jargon imported from other disciplines—the Frankfurt School of sociology, existentialism and phenomenology, neoclassical economics and capital-markets theory—is appearing in the law journals. New ideas are spreading across the empire of doctrinal analysis.

Geoffrey P. Miller, *A Rhetoric of Law*, 52 U. Chi. L. Rev. 247, 247 (1985) (reviewing James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character and Community* (1984)).

2. The best known critique of the new “impractical” legal scholarship is the article by Judge Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992). A rejoinder by Professor Levinson recognized the

well-documented disinclination of an increasing number of legal academics to write about the American legal system from the “internal” perspective of the judge or practitioner and an inclination instead to write for an audience consisting primarily of other scholars whose lives are lived “outside” the actual practice of law as conventionally defined. The reasons for this development are multiple and complex, ranging from the contingencies of political elections and the “capture” of the judiciary, in the last decade especially, by a political party with which most legal academics do not identify, to much vaster cultural issues surrounding the concept of “modernity” and “modernization.”

the profession,³ much of it is neither comprehensible nor relevant to the concerns of judges and practitioners.⁴ More recent academic literature advocates a return to formalism, a so-called neoformalism.⁵ The judicial temptation to succumb to a new era of formalism and its exclusive values of certainty and predictability may be magnified when courts are convinced that much of the product of academic lawyers is no longer useful in the extension and refinement of doctrine.

Corbinized contracts scholars who have been immersed in the realism of Karl Llewellyn are often characterized as “neoclassical” guardians of dominant contract doctrine.⁶ Critics describe neoclassical contract law as “the law of the Uniform Commercial Code, [and] the Restatement (Second) of Contracts It is ‘neoclassical’ because it addresses the shortcomings of classical [contract] law rather than offering a wholly different conception of the law.”⁷ Critical Legal Studies (“CLS”) scholars assert that because

Sanford Levinson, *Judge Edwards' Indictment of "Impractical" Scholars: The Need for a Bill of Particulars*, 91 Mich. L. Rev. 2010, 2010-11 (1993); see also Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 Mich. L. Rev. 2075, 2111 (1993) (“Some of the new wave of scholarship does indeed seem horribly pretentious and vacuous—schlock economics, schlock history, schlock philosophy, schlock poststructuralist theory—with little promise of helping anybody to understand the legal world or work in it or transform it. Almost all the articles are far too long.”). Notwithstanding this criticism, the Author otherwise defends the value of theoretical scholarship.

3. See Graham C. Lilly, *Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 Va. L. Rev. 1421 (1995).

4. Recognizing that no judge could benefit from certain “wild literature” in the law journals, Judge Richard Posner wondered why legal scholarship must always serve only the legal profession. While “much of their vast scholarly output is trivial, ephemeral, and soon forgotten,” that is the nature of scholarship, which is a “high-risk, low-return activity” analogous to salmon breeding where only two of 6000 salmon eggs may produce two adult salmon. Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 Mich. L. Rev. 1921, 1928 (1993). In a tribute to the work of leading Critical Legal Studies scholar Professor Mark Tushnet, the authors conclude, “Many, if not most, law professors are completely invested in the internal practice of law and nothing Mark says should have much relevance for them.” Jack M. Balkin & Sanford Levinson, *Legal Historicism and Humanity: The Work of the Law Professor in the Wake of Bush v. Gore*, 90 Geo. L.J. 173, 174 (2001).

5. William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 Wis. L. Rev. 971.

6. Labels such as “neoclassical” may be rejected by such scholars. Karl Llewellyn was called a “realist” and those who subscribe to his contract law, as illustrated in Article 2 of the Uniform Commercial Code (“U.C.C.”) may insist on this characterization. Still others may prefer “modern” contract law, as manifested by the U.C.C. and the Restatement (Second), of Contracts. In this article, “neoclassical” refers to those scholars who share a Corbin/Llewellyn/U.C.C./Restatement (Second), perspective. This Article recognizes, however, that neoclassical contract law is a continuously evolving, anti-formalistic set of norms and guides that must be constantly scrutinized and criticized in pursuit of a more realistic, precise and fair recognition of the actual or presumed intention of the parties to the contract.

7. Jay M. Feinman, *Relational Contract Theory in Context*, 94 Nw. U. L. Rev.

every rule and standard of neoclassical contract law can be deconstructed, they are hopelessly indeterminate.⁸ Relational and empirical contracts scholars, however, view neoclassical rules as excessively determinate and its flexible standards as woefully inadequate to address the complexity of attitudes and behavior that inhere in every contractual relationship.⁹ Scholars advocating the economic analysis of law believe that neoclassical theory is not sufficiently oriented to the values of wealth maximization and efficiency which promise rationality, certainty and predictability in contracts adjudication.¹⁰ Neoformalists contend that flexible standards of neoclassical doctrine create an illusion of “immanent law” whose very existence is questionable.¹¹ To avoid dangerous judicial speculation, unlike the “wholly different conceptions” of contract law, neoformalists urge courts to enforce the facially unambiguous terms of a contract “as written.”¹² The neoclassical tradition has not wholly embraced these different conceptions.

With the exception of an extremely limited appreciation of basic economic theory, the contracts case law does not reflect the new theories. Nor are they reflected in any relevant statute. It is important to consider whether neoclassical theory or one or more of the new conceptions can better serve the social institution of contract in the twenty-first century.

II. THE “WHOLLY DIFFERENT CONCEPTIONS” OF CONTRACT LAW

A. *The “Death of Contract”*

Though it did not provide the substantive basis for new contract theories, Grant Gilmore’s startling 1974 monograph, “The Death of Contract,”¹³ was a catalyst for a movement away from doctrinal contracts scholarship to theoretical concepts that are highly critical of current doctrine. Gilmore described a dramatic alteration of contract doctrine in a new era of “contort.”¹⁴ Promissory estoppel would overwhelm the monistic bargained-for-exchange requirement of consideration that was alleged to be nothing more than a belated

737, 738 (2000).

8. See *infra* Part II.B.

9. See *infra* Part II.C, E.

10. See *infra* Part II.F.

11. See *infra* Part IV.

12. Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 Nw. U. L. Rev. 847, 851 (2000) (citing Eric Posner, *A Theory of Contract Under Conditions of Radical Judicial Error*, 94 Nw. U. L. Rev. 749 (2000)).

13. Grant Gilmore, *The Death of Contract* (1974).

14. For commentary on the “contort” concept, see Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 Geo. L.J. 875 (1985); see also Peter Linzer, *Law’s Unity—An Essay for the Master Contortionist*, 90 Nw. U. L. Rev. 183 (1995).

analysis manufactured by O.W. Holmes.¹⁵ The book was widely promulgated and cited hundreds of times in law reviews. Notwithstanding the generally accepted view that its thesis is historically and analytically unsound,¹⁶ it is often welcomed as provocative, whimsical and entertaining. The few judicial references to Gilmore's book are attenuated at best, such as a casual phrase in a United States Supreme Court opinion warning that contract law must not be allowed to "drown in a sea of tort"¹⁷—a repudiation of "contort." Beyond the thesis' flawed history, it became abundantly clear, even to Gilmore,¹⁸ that the reported "death of contract" was at least premature since the thesis appeared while contract law was undergoing a period of historic vitality in the recorded case law.¹⁹ As one court aptly suggested two decades after the book appeared, "'We are told that Contract, like God, is dead.' In this computer age case,

15. See Gilmore, *supra* note 13, at 17-23.

16. See, e.g., Richard Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 Stan. L. Rev. 1161 (1975). See also the insightful analysis by Professor Perillo describing the serious flaws of Gilmore and others concerning the origins of the objective theory. Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 Fordham L. Rev. 427 (2000).

17. *Nathaniel Shipping, Inc. v. Gen. Elec. Co.*, 920 F.2d 1256, 1263 (5th Cir. 1991) (quoting *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986)).

18. In 1981, Professor Gilmore reflected on a conference concerning the teaching of contract law: "So I think we should provide ourselves with an explanation of why this field of law, which somebody or other said was dead, some time ago, is not only alive and well but bursting at the seams." Charles D. Kelso, *The 1981 AALS Conference on Teaching Contracts: A Summary and Appraisal*, 32 J. Legal Educ. 616, 640 (1982). His ensuing "explanation," however, clings to the "contort" notion. "[T]he rebirth of contracts is an accomplished fact. It makes no difference that it has been reborn as 'contort.'" *Id.* at 642.

19. Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 Wis. L. Rev. 577, 583 [hereinafter Galanter, *Contract Litigation*].

[T]here was a great surge of contract litigation after 1960 that for several decades outpaced the increase in tort. Diversity contract filings in the federal district courts rose steadily from less than five thousand cases in 1960 to over thirty-two thousand cases in 1988. From 1982 to 1990, often regarded as the very core years of the litigation explosion, diversity contracts filings actually outnumbered tort filings.

Id. at 583. It is clear that "There are more contract cases today than a century ago—and there are far more per capita than there were during the twentieth century [between 1930 to 1960]." *Id.* at 623. In 1992, contracts cases filed in state courts of the nation's seventy-five largest counties numbered 365,263. Over forty-nine percent of these cases resulted in an agreed settlement. Carol J. DeFrances & Steven K. Smith, U.S. Dep't of Justice Statistics Special Report, *Civil Justice Survey of State Courts 1992, Contract Cases in Large Counties* 8 (1996). The table is reproduced by Galanter. Galanter, *Contract Litigation*, at 625. In his book, Gilmore christened Professor Stewart Macaulay as the "Lord High Executioner" of the "Contract is Dead" movement based upon his pursuit of the empirical description of contract discussed *infra* Part II.E. In 1985, Macaulay suggested that Gilmore's title ("Death of Contract") is misleading since "Contracts as a living institution is very much with us." Stewart Macaulay, *An Empirical View of Contract*, 1985 Wis. L. Rev. 465, 465.

we learn that Contract, at least, is very much alive and well in the Ninth Circuit.”²⁰

B. Critical Legal Studies

The most provocative legal theory of the twentieth century was the revolutionary effort with the benign title, “Critical Legal Studies.”²¹ Though it describes all legal reasoning as myth, its principal target is contract law because the social institutions of contract and property constitute the mechanism of the market system.²² CLS is expressly Marxist and nihilistic,²³ which necessitates the harshest criticism of capitalism and its operative mechanisms.²⁴ CLS language is filled with

20. *Apollo Group, Inc. v. Avnet, Inc.*, 58 F.3d 477, 478 (9th Cir. 1995). After the sentence, “We are told that Contract law, like God, is dead,” the next sentence of the Gilmore book reads, “And so it is.” Gilmore, *supra* note 13, at 1.

21. See Roberto Mangaberra Unger, *The Critical Legal Studies Movement* (1986) (Professor Unger is the philosophical architect of the movement); Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. Legal Educ. 505 (1986); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 Yale L.J. 1515 (1991) [hereinafter Tushnet, *Political History*].

22. See John E. Murray, Jr., *Murray on Contracts* 13 (2001) [hereinafter Murray, *Contracts*].

Private property determines who is to possess and control the resources of society. Contract determines how persons and resources are brought together in the productive and allocation processes. Property and contract together constitute the mechanism of competition. Profit and utility maximization compel firms and consumers to produce and to buy. Freedom of trade ensures that industry and markets will be open to those who seek to maximize their profits and utilities.

Id.

23. This thesis asserts that all efforts to provide a principled account of judicial behavior (or anything else, for that matter) are vulnerable to the techniques of deconstruction, or “trashing” as it has affectionately come to be known [sic] among its practitioners. A corollary of this thesis is that all judicial efforts at principled decision-making are necessarily doomed to failure. It is the nihilist implications of the indeterminacy thesis that has caused the critical legal studies movement to be such a controversial one.

Girardeau A. Spann, *A Critical Legal Studies Perspective on Contract Law and Practice*, 1988 Ann. Surv. Am. L. 223, 225. “I am not overlooking the fact that critical legal studies is frequently associated with contemporary versions of Marxism. Although this association has undoubtedly contributed to the controversy surrounding the movement, I suspect that it is the nihilist proclivities of certain adherents that has generated most of the alarmist opposition.” *Id.* at 225 n.5; see also Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L.J. 1 (1984). For a critique of the Singer analysis, see John Stick, *Can Nihilism Be Pragmatic*, 100 Harv. L. Rev. 332 (1986).

24. See Singer, *supra* note 23, at 23 (“The entire structure of wage labor on which capitalism is based . . . violates the Constitution unless the government compensates workers for corporate profits paid to shareholders.”). A well-known CLS theorist, Professor Duncan Kennedy, emphasized this bias by suggesting that capitalism might be considered a form of duress in creating pressures which may not be different from the violence of pointing a gun at the other bargaining party. Kelso, *supra* note 18, at 627. In *The Dilemmas of Liberal Constitutionalism*, 42 Ohio St. L.J. 411, 424 (1981), a leading CLS scholar, Mark Tushnet, suggested that if he had been appointed to the federal bench, he would most “likely advance the cause of socialism.”

notions of economic slavery in a society of power structures maintained and enhanced by culturally determined rules of contract law. Any suggestion of rational norms is denounced as the unwitting promulgation of pervasive political influence.²⁵ CLS is designed to prove that any rule, principle or standard of contract law as well as other doctrinal norms can be deconstructed (read "destroyed").²⁶ Since every theory, including CLS theory, can be deconstructed, even

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25. Critical legal studies scholars claimed that "law is politics," and by that they meant not merely that politics has an important influence on law, say, through judicial appointments, but rather that the development of the law is continuous with, if not reducible to, the exercises of political will and power. They argued that all normative structures, especially those of the law, are riddled with a "fundamental contradiction," a conflict between the longing for intimacy and the distrust of others. As a result of this conflict, all normative structures point in two directions and are thus radically indeterminate with respect to the duties or conclusions they impose. There are no right answers in law, nor could there ever be. Rather, law is simply politics in formal garb.

Owen M. Fiss, *What Is Feminism?*, 26 Ariz. St. L.J. 413, 424 (1994).

26. Clear examples of CLS deconstruction are difficult to discover in the otherwise obtuse CLS literature. Professor Spann provides illustrations of the deconstruction of contract theory beginning with the mutual assent foundation to the concept of agreement. Spann, *supra* note 23, at 233-50. The requirement of mutual assent is said to rest on an opposition between agreement and non-agreement. Agreement is favored over non-agreement because the object of contract is to enforce consensual transactions: "Accordingly, a contractual obligation is enforceable only to the extent that it results from a meeting of the minds." *Id.* at 233. As authority for this statement, the author cites the treatise of Allan Farnsworth, failing to note that Professor Farnsworth is and always has been a prominent critic of the misleading phrase, "meeting of the minds"—a view shared by other neoclassicists. Having posited the emasculated premise of the "will theory" of contract law, the illustration proceeds: "If a court were to enforce an apparent contract that did not genuinely embody a meeting of the minds, it would be aligning itself with the coercive, disfavored member of the hierarchy [or non-agreement]." *Id.* at 234. Since contract disputes reflect the parties' disagreement over the effect to be accorded the terms of their agreement, "there is no mutual assent—no contract—with respect to that contingency. As a result, enforcement of the putative agreement constitutes coercive judicial interference with the autonomy of the promisor in derogation of the consensual nature of contractual obligation." *Id.* The inevitable conclusion is that the original hierarchy—agreement over non-agreement—is inverted and the principle of mutual assent has been deconstructed. The mutual assent principle "not only fails to account for the manner in which courts determine whether a contract exists, but it also fails to have any coherent content." *Id.* It is, therefore, a clear illustration of the "indeterminacy thesis" of CLS, i.e., "all principled accounts of perceived phenomena are demonstrably inadequate." *Id.* at 230. A footnote to the deconstruction of the mutual assent principle admits the possibility "that the parties really did reach agreement with respect to the troublesome contingency and that one of the parties is simply pretending that no agreement was reached." *Id.* at 234 n.23. This possibility, however, does not resurrect contract theory for CLS advocates because such "pretending" is said to convert the case into "a tort case, involving fraud on the part of one of the parties, with which classical contract law has no reason to concern itself." *Id.* This illustration is followed by deconstructions of the concepts of intent, volition, expectation and consideration, all based on ancient views which bear only the faintest resemblance to modern contract law. See also Edgar A. Hahn, *Essay: A Primer on Deconstruction's "Rhapsody of Word-Plays,"* 71 N.C. L. Rev. 201 (1992).

the principle of contradiction must be ignored, except when it is used to support the theory.²⁷ CLS scholarship is predicated on an eclectic and ersatz philosophy expressed in obtuse language punctuated by startling allegations designed to shock, punish and destroy.²⁸ A typical CLS law review article allocates enormous space to a barely penetrable introduction that redefines ordinary terms as a prelude to what is billed as a radical thesis.²⁹ The resulting product is obscure, often irrelevant and counterproductive to the refinement and enhancement of legal doctrine which it eschews. Having allegedly demolished extant structures, the CLS scholar is more than reluctant to present an alternative design that will rise from the ashes on the footing that CLS expertise is limited to demolition. Attempts to fill that enormous gap produce an ambiguous "communitarian" notion of a vague utopia.³⁰

While CLS has been mentioned thousands of times in law journals, it is virtually ignored in the case law.³¹ The work of its luminaries is

27. See Fiss, *supra* note 25, at 424 (concerning the CLS principle of "fundamental contradiction"). The author, however, discovers a subsequent rejection of that view by prominent CLS scholars. See Duncan Kennedy & Peter Gabel, *Roll Over Beethoven*, 36 Stan. L. Rev. 1, 15-18 (1984); see also Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. Legal Educ. 518, 560-62 (1986).

28. See William Ewald, *Unger's Philosophy: A Critical Legal Study*, 97 Yale L.J. 665 (1988) (questioning the level of Roberto Unger's understanding of the schools of philosophy to which his work refers).

29. See Ronald K. L. Collins, *Outlaw Jurisprudence?*, 76 Tex. L. Rev. 215, 215 (1997) (reviewing *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (John D. Caputo ed., 1997)).

30. See the description of Duncan Kennedy's "utopia" in Kelso, *supra* note 18, at 628-29. Professor Robert Nozick, then chair of the Department of Philosophy at Harvard University, suggested,

It would be better, however, if critique did not involve the systematic violation of the principle that you do not reject a theory until a better theory is available. Indeed, since every theory will have defects, it is not enough to reject a theory on the basis of discerned flaws and inadequacies, especially if all one has to suggest in its place is something vague and ill-defined. (For instance, "communitarianism;" see, for example, Roberto Unger, *Knowledge and Politics*, Free Press, New York, 1975.)

Robert Nozick, *Philosophical Explanations* 631 n.* (1981).

31. Judge Judith Kaye of the New York Court of Appeals commented on the paper of Professor Spann, *supra* note 23, as follows:

What I search for—in vain—in this paper is some proof of its pronouncements. Professor Spann declares that "the critical legal studies movement has demonstrated that the prevailing model of our decision-making process is inadequate," and he further declares that the critical legal studies movement offers something better. I seriously doubt both, and I find no proof of either. There is no consideration of cases in this paper. There is no reference to the experience of a practicing Crit lawyer or Crit judge, if indeed there could be such a creature. There's no empirical data of any sort. There's something disturbingly conclusory about all of this. Sweeping declarations that "all judicial efforts at principled decision-making are doomed to failure," that "there can be no principled explanation for decisions," that "all legal decisions are... incapable of satisfactory

also ignored, though its obtuse presentation may be wryly dispatched.³² It is anything but remarkable that CLS theory suffered a sudden death.³³ What is remarkable is the number of law review editors it managed to seduce and the generation of law students held captive by its advocates who maintained a condescending tone toward their non-CLS colleagues.³⁴ A warning from Dean Paul Carrington unwittingly infused longevity into the "movement" when he not only questioned its premises but urged its advocates to have the integrity to resign.³⁵ CLS scholars suspected that such "alarmist opposition" was generated primarily because of their nihilist rather than Marxist views.³⁶ After all, why should anyone be concerned that a CLS professor dedicated his teaching to debunking any claim of certainty and rationality in the law?³⁷ Carrington's suggestion prolonged the

justification." that "law is really nothing at all," and that the law is a "mere conglomeration of destructible doctrines that necessarily have no effect on the way that legal decisions are made"—just to pick a few random quotes from this paper—are provocative, they indeed have a certain ring. They just don't ring true.

Judith S. Kaye, *Comments on Professor Spann's Paper: Commentary by Judith S. Kaye*, 1988 Ann. Surv. Am. L. 266-67.

32. In *Charlton v. Charlton*, 413 S.E.2d 911 (W. Va. 1991) (Neely, J., concurring in part and dissenting in part), after quoting the feminist legal philosopher Catharine MacKinnon, the justice compares her writings with those of the philosophical leader of the Critical Legal Studies movement, Roberto Unger. "Ms. MacKinnon undoubtedly has some very intelligent things to say, but when I read her, I have the same overwhelming sense of deprivation that I experience reading Roberto Unger. Indeed, it is a tragedy that fate has denied these great luminaries the opportunity to write in their native languages." *Id.* at 919 n.3.

33. During the late 1970s, and for a good part of the 1980s, critical legal studies played a leading role in the theoretical debates in American law schools. Hundreds attended annual conferences. Faculty appointments were made in some of the leading law schools, such as Harvard and Stanford. Student interest was insatiable. Today, the situation is strikingly different. Students have been diverted. There are no new faculty recruits. The work of critical legal studies scholars is of virtually no interest in American philosophical circles. Many of its central tenets, including the fundamental contradiction and the indeterminacy thesis, have been renounced . . . Critical legal studies is dead . . .

Fiss, *supra* note 25, at 424.

34. "[T]hese critics or outsiders do not understand what [CLS] is." Tushnet, *Political History*, *supra* note 21, at 1516. The author adds, "For example, if people interested in law and economics spent one tenth of the time understanding critical legal studies that [CLS] people spend understanding law and economics, we would all be better off." *Id.* at 1519 n.17.

35. "[T]he nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school." Paul D. Carrington, *Of Law and the River*, 34 J. Legal Educ. 222, 227 (1984).

36. "My guess is that Dean Carrington, for example, would be relieved to learn that members of the critical legal studies movement were merely Marxists." Spann, *supra* note 23, at 225 n.5.

37. In a 1981 Conference on the teaching of contract law, Professor Duncan Kennedy stated "that his role as a teacher was to debunk claims to certainty and rationality in the law." Kelso, *supra* note 18, at 627. The technique of deconstruction is used to accomplish this end. See *supra* note 23.

agony by compelling those who would have otherwise ignored CLS to leap to its defense on the footing that a professor has every academic freedom to present not only disagreeable but silly views.³⁸ Now that the abject poverty of the theory is generally accepted, Carrington's insight may appear more precocious than inappropriate.

C. Relational Contract Theory

The *relational* theory of contract law is attributed to the lifetime scholarship of Professor Ian Macneil, who focused on the primal roots of the concept of exchange and emphasized the relational character of contracts.³⁹ Instead of the discrete or static transaction underlying classical contract theory, Macneil recognized contract relationships that extend far beyond the original offer and acceptance and insisted that contract rights and duties should be determined within the overall context of continuing relationships. While insisting that classical contract law pretends that contractual obligations are conclusively fixed and determined at a given moment of formation, Macneil finds little solace in the neoclassical modifications of doctrine which, he believes, continue the classical view with only an occasional and woefully insufficient nod to the relational context. Advocates of relational theory assert that the neoclassical school simply absorbs the theory, pretending that it is neither revolutionary nor radical but simply an extension of neoclassical truth.⁴⁰ There is a very good reason why neoclassicists do not regard relational theory as anything more than a helpful insight supporting neoclassical theory. It is not a new "school" or separate "theory" of contract law simply because attention has been focused on the relational nature of contracts.⁴¹ It is a valuable emphasis, but it is hardly a "wholly new concept." While neoclassicists see relational concepts as desirable elaborations of neoclassical theory, relationists see neoclassical theory as a subset of an "overarching relational legal approach."⁴² Neoclassical recognition of a theory as an important emphasis necessarily disappoints those who passionately assert their discovery of truth and will not abide any

38. The earliest exchanges were not long in coming. See "Of Law and the River," and of Nihilism and Academic Freedom, 35 J. Legal Educ. 1 (1985).

39. See Ian R. Macneil, *The New Social Contract* (1980). Other articles by Professor Macneil elaborating his thesis include *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, And Relational Contract Law*, 72 Nw. U. L. Rev. 854 (1978); *Efficient Breach of Contract: Circles in the Sky*, 68 Va. L. Rev. 947 (1982); *Values In Contract: Internal and External*, 78 Nw. U. L. Rev. 340 (1983); *Restatement (Second) of Contracts and Presentation*, 60 Va. L. Rev. 589 (1974);

40. See Feinman, *supra* note 7, at 739.

41. See Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 Nw. U. L. Rev. 805 (2000).

42. Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 Nw. U. L. Rev. 877, 907 (2000).

suggestion that it is not unitary truth.⁴³

Relational theory wars against a contract law that no longer exists. Even the chief architect of the relational movement admits an insuperable challenge in discovering illustrations of purely “discrete” transactions containing no relational elements, the quintessential target of his thesis. To purify the spectrum of contracts ranging from the purely discrete to the highly relational, it was necessary to recognize that the purely discrete end of the spectrum does not exist. It had to be replaced with a fiction—an “as-if-discrete” transaction.⁴⁴ The theoretical illustration, however, requires dynamic modifications of classical theory to be ignored. The elaboration of relational theory required a target other than modern contract law. The target had to be classical contract theory that was in a state of continuous erosion, a veritable straw man, which Macneil and a handful of disciples proceeded to pummel.⁴⁵

D. Ignoring the Radical Nature of Neoclassical Theory

Critical legal scholars and, to a lesser extent, relationists, project a world without the pervasive influence of Arthur Linton Corbin who rejected monistic rules and provided a foundation for a modern and realistic contracts jurisprudence. They trivialize the contribution of

43. See, e.g., Feinman, *supra* note 7, at 740 (criticizing the “limited” neoclassical account of relational theory).

44. Macneil, *supra* note 42, at 895.

45. A cogent example appears in Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 Buff. L. Rev. 763 (1998) [hereinafter Gudel, *Concept of Exchange*] where the author presents two “quick” illustrations of the defects of contract theory. The first is an 1881 case, *Mo. Furnace Co. v. Cochran*, 8 F. 463 (C.C.W.D. Pa. 1881). In *Cochran*, the buyer contracted for a year’s supply of coal at \$1.20 per ton. *Id.* at 463. Shortly after the contract began, the market price rose to \$4.00 per ton which caused the seller to repudiate the contract. *Id.* at 464. The buyer made a substitute purchase at \$4.00 per ton and sought to recover the difference between the contract price and the substitute (“cover”) price. *Id.* The market price then descended to \$1.30 per ton and the court applied the difference between the contract price (\$1.20) and the market price (\$1.30) at the time of delivery. *Id.* at 467. After insisting that the deficiencies of the court’s analysis would be vastly improved through relational theory, the author states, “Today, happily, *Missouri Furnace* would come out differently under Article 2 of the Uniform Commercial Code . . .” Gudel, *Concept of Exchange*, at 767 (citing U.C.C. § 2-712, which permits a buyer to make a reasonable “cover” purchase that would allow the buyer in such a situation to recover the difference between the market and cover prices). In the second illustration, *Air Terminal Servs., Inc. v. United States*, 330 F.2d 974 (Ct. Cl. 1964), the defendant created a large number of metered parking spaces near the Washington National airport terminal one year after entering a three-year contract with the plaintiff to operate parking lots at the terminal. *Id.* at 976. The plaintiff claimed a breach of contract which the court rejected on the grounds that the defendant had never promised not to install parking meters and there was no warranty to this effect. *Id.* at 976-77. Gudel, however, admits, “This decision would probably come out differently today. A court would likely find that in installing the meters, the United States had violated the covenant of good faith that the law implies into every contract.” Gudel, *Concept of Exchange*, at 768 (citing U.C.C. § 1-203).

Karl Llewellyn as little more than a modest tinkering with classical theory. The genuine "wholly different conception" of contract law, however, occurred a half century ago with the introduction of Article 2 of the Uniform Commercial Code, created by Llewellyn, who had been Corbinized by his teacher. Llewellyn not only intended but effected radical changes in contract doctrine and became justifiably furious when these changes were marginalized rather than recognized as "deep, wide and vital."⁴⁶ The new theories either reject this characterization of Llewellyn's contribution or conclude that the changes he ordained were not nearly deep and vital enough. They necessarily reject the importance of the same or similar modifications of classical doctrine in the Restatement (Second) of Contracts. The new theories are sometimes seen as descendants of the realists' rejection of formalism, but their proponents deemphasize this heritage because they aspire to being heralded as the creators of "wholly different concepts."⁴⁷ Relational theory may be seen as an elaboration of realism. CLS, on the other hand, is a distortion of realism. The ineluctable end of CLS theory is self-destruction and despair.

46. Statement of Karl Llewellyn in 1 State of New York Law Revision Commission Report: Hearings on the Uniform Commercial Code 49 (1954) [hereinafter Hearings]. Llewellyn also made it clear that the Code would "remake" sales law "*vigorously and over the whole field*, in order that the law may be made to conform to commercial practice and may be read and make sense." *Id.*

47. In their continuous efforts to reduce neoclassical theory to irrelevancy, critics sometimes resort to absurdities. Thus, "neoclassical contract law" is characterized as "residual," since subjects such as labor law and corporate law "are no longer within the scope of contract." Moreover, neoclassical contract law is also said to be "fragmented" since "the law of sales" along with leases and, more recently, computer information transactions are "marked off for separate treatment." See Feinman, *supra* note 7, at 738-39. The notion that areas such as labor law or corporate law are not within the "scope" of contract suggests no relation between these subjects and contract law. It is theoretically possible to construct a course in contract law that would include both corporate law and labor law as well as insurance law, antitrust law and others. The first year of law school could then be devoted to one omnibus course called "contracts." The fact that these courses are treated separately in law school curricula does not suggest that they are outside the scope of contract law which is an indispensable foundation for such courses. The charge that neoclassical contract law is "fragmented" because Article 2 deals only with contracts for the sale of goods, the more recent Article 2A deals with leases and the very recent Uniform Computer Information Transactions Act ("UCITA"—formerly found in draft form as Article 2B of the U.C.C.), is a colossal misrepresentation. The radically new contract law of Article 2 forms the basis for neoclassical contract law as applied to all contracts through its assimilation in the Restatement (Second) of Contracts and the pervasive willingness of courts to apply Article 2 contract law by analogy to any contract. The need for Article 2A was, and continues to be, dubious since, with some exceptions, it applies the principles of Article 2 only with language changes to manifest leasing terminology. Real "fragmentation" exists only in the even more dubious UCITA. Though it claims an Article 2 heritage, it clearly departs from the neoclassical tradition and augurs a dangerous retrogression to the formalism of classical contract law which must be an even worse fate to the new theorists than a simple continuation of the application of neoclassical contract law to computer information transactions.

Llewellyn's new paradigms made so much sense that they have been assimilated into the fabric of contract law with insufficient appreciation of their radical nature. The entire agreement process was affected. The obsession was a more precise and fair identification of the *agreement* of the parties—their “bargain-in-fact”—as manifested not only by their words, but by prior course of dealing, trade usage and course of performance as well as other relational circumstances.⁴⁸ Formalistic and technical rules were rejected, repudiated and scorned.⁴⁹ Monistic theories of contract law were deconstructed, but replaced with principles and guides that would allow courts to better approximate the “true understanding” of the parties.⁵⁰ The definition of “contract” was stated in terms of the legal effect attributable to the parties’ “agreement,” the quintessential focus of contract law, unfettered by technical constraints.⁵¹ It was no longer necessary to determine the precise moment of formation.⁵² The failure of the parties to express any number of terms would no longer be fatal if they manifested an intention to be bound and there was an adequate

48. “‘Agreement’ means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage or trade or course of performance as provided in this Act.” U.C.C. § 1-201(3) (2001).

49. Llewellyn's disgust with the use of the “title” concept provides an apt illustration. The Comment to U.C.C. § 2-101 evidences this view. Emphasizing that U.C.C. Article 2 is committed to determining legal consequences exclusively from the contract of the parties “without resorting to the idea of when property or title passed,” the Comment concludes, “The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.” U.C.C. § 2-101 cmt.

50. The U.C.C. “makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the *true understanding* of the parties as to the agreement may be reached.” U.C.C. § 2-202 cmt. 2 (emphasis added).

51. Among the numerous emphases placed on the “anti-technical” nature of U.C.C. Article 2, see § 2-204(3) (though numerous terms are omitted, “a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy”); § 2-206 cmt. 1 (“Former technical rules as to acceptance . . . are rejected.”); § 2-205 (no consideration is necessary to make an offer by a merchant a firm offer if it is evidenced by a writing and gives assurance that it will be held open to effect the deliberate intention of a party to make an offer binding without technical constraints); § 2-209(1) cmt.1 (no consideration is necessary to make a modification binding to allow modifications “without regard to the technicalities which at present hamper such adjustments”); § 2-306 (requirements and output contracts will be enforced according to a standard of good faith and best efforts). Neither the archaic doctrine of mutuality or obligation nor indefiniteness will preclude their enforceability. See also § 1-102(1) (directing a liberal construction of the entire Code “to promote its underlying purposes and policies”); § 1-106 cmt. 1 (directing a liberal administration of the remedies provided in the Code “to negate the unduly narrow or technical interpretation of some remedial provisions of prior legislation”).

52. U.C.C. § 2-204(2) (“An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.”).

basis to afford a remedy in the event of breach.⁵³ The radical new principle recognized the inherent indefiniteness and relational character of contracts:

The rejection of formalism is pervasive in the new contract law. The algebraic operation of the sacred "matching acceptance" rule was eschewed,⁵⁴ and numerous circumstances in the relation of the parties became relevant to determine whether the terms of the original manifestation of assent were unconscionable.⁵⁵ Classical theory assumed that the typical offer required a particular manner of acceptance. Article 2 and its progeny assume that the typical offeror is indifferent as to the manner or medium of acceptance.⁵⁶ Classicists were startled by the notion that accepting an offer by the shipment of nonconforming goods constituted both an acceptance and simultaneous breach, absent reasonable notice of an accommodation shipment.⁵⁷ Classical contract law insisted that offers had to be revocable, absent a separate option contract to make them irrevocable.⁵⁸ Neoclassical contract law recognizes that offers may be made irrevocable through reliance or, under Llewellyn's insertion, by an assurance that the offer will not be revoked.⁵⁹ Criticism of the archaic pre-existing duty rule had its effect. Only those who insist that reliance is everything will be displeased with the willingness of modern courts to recognize reliance as a critical factor in pre-contractual as well as post-formation circumstances.⁶⁰ The "agreement" in the new contract law is anything but static. Absent any consideration or reliance, it may be modified by a subsequent agreement including the powerful evidence of agreement called "course of performance" which the new theories often ignore.⁶¹ Trade

53. *Id.* § 2-204(3) ("Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."). This is the genus section which is then supplemented by numerous sections, particularly §§ 2-304 through 2-316.

54. *Id.* § 2-207.

55. *Id.* § 2-302.

56. *Id.* § 2-206; see John E. Murray, Jr., *A New Design for the Agreement Process*, 53 Cornell L. Rev. 785 (1968).

57. U.C.C. § 2-206(1)(b). "It is difficult to understand how the shipment of goods can be both an acceptance and a breach. It will also be difficult to determine whether or not a shipment of non-conforming goods was offered as an accommodation to the buyer in substitution for the goods described in the order." Hearings, *supra* note 46, at 33 (statement of Karl Llewellyn).

58. Even classical contract law recognized the necessity to make an offer in a "unilateral" contract irrevocable because of the offeree's part performance in reliance on the offer. Restatement (First) of Contracts § 45 (1932).

59. U.C.C. § 2-205.

60. See Murray, *Contracts*, *supra* note 22, at § 66[C].

61. U.C.C. §§ 2-208(3), 2-209(1). Formalists do not ignore course of performance or other unexpressed terms of the "agreement" such as trade usage and prior course of dealing. They cast significant doubt on their verifiable existence and claim that they allow incompetent courts to engage in irrational speculation of the "agreement"

usage, course of dealing and course of performance are so important that Article 2 insists that they are necessarily part of any contract and impervious to parol evidence rule excision.⁶² Indeed, relational “course of performance” will even overcome the express terms of the contract⁶³—the rejection of the “static” contract straw man. The notorious “plain meaning” rule of interpretation is emasculated⁶⁴ and the parol evidence rule is relegated to a convincing manifestation that parties “would certainly” not intend to be bound by alleged agreements prior to their execution of a final and complete record.⁶⁵ These and other clear illustrations of the pervasive antitechnical, antiformalist and relational nature of the new contract law are not given anything like their due among CLS scholars or relationists.⁶⁶ They find Llewellyn’s realism insufficiently realistic or relational and lacking empirical verification.

E. Empirical Theories

Like relationists, advocates of the *empirical* (“Law and Society”) school lament the severe limitations of a comprehensive verification of a contextual contractual relationship. The original work of Stewart Macaulay emphasized the overriding importance of reputation and other informal controls that questioned the significance of neoclassical contract theory.⁶⁷ Recent scholarship questions some of the basic

which they would limit to its express terms. *See infra* Part III.

62. U.C.C. § 2-202(a).

63. While U.C.C. § 2-208 lists the hierarchy of trade usage, course of dealing and course of performance from lowest to highest and insists that even course of performance is subservient to the express terms of the contract, U.C.C. § 2-208(3) imports § 2-209 to allow express terms to be waived or modified by course of performance. Indeed, if course of performance as defined in U.C.C. § 2-208(1) is discovered, it necessarily prevails over express terms.

64. Comment 1(b) to U.C.C. § 2-202 “definitely rejects . . . [t]he premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used.”

65. The “would certainly” test in U.C.C. § 2-202 cmt. 3 admits more evidence than the traditional “natural omission” test created originally by Williston, and the classical requirement that language must be facially ambiguous to allow a court to consider prior or contemporaneous evidence is emphatically rejected. U.C.C. § 2-202, cmt. 1(c); *see Murray, Contracts, supra* note 22, at § 84[C][6]. For an early recognition of the liberalization of the parol evidence rule under the Code, *see* the opinion by Justice Roger Traynor in *Masterson v. Sine*, 436 P.2d 561, 564 (Cal. 1968) (“The draftsmen of the Uniform Commercial Code would exclude the evidence in still fewer instances . . .”).

66. For an exposition of modern contract law and its rejection of numerous fundamental concepts of classical contract law, *see* Melvin A. Eisenberg, *The Emergence of Dynamic Contract Law*, 88 Cal. L. Rev. 1743 (2000).

67. Stewart Macaulay et al., *Contracts: Law in Action* (2001) (cases and materials); Stewart Macaulay, *Long Term Continuing Relations: The American Experience Regulating Dealerships and Franchises*, in *Franchising and the Law: Theoretical and Comparative Approaches in Europe and the United States* (Christian Joerges ed., 1990); Stewart Macaulay, *Non-Contractual Relations in Business*, 28 Am.

assumptions concerning the existence of empirical data.⁶⁸ The unfulfilled empiricist aspiration is clear: only if every contracts dispute can be subjected to comprehensive empirical and contextual verification will the true contract of the parties, manifested by their continuing relationships, be exposed. Academic lawyers who advocate such empirical verification have much more time than courts to pursue it, but they fail to produce anything resembling a functional empirical structure as they bemoan the inability of courts to provide ultimate contextual verification in every contracts dispute. A judicially functional structure that the empiricists would find totally acceptable is, therefore, impossible.⁶⁹ The original empiricist view that informal controls dominated the contracting process⁷⁰ was later altered by the discovery that “relational sanctions do not always produce cooperation or happy situations. Trust can be misplaced.”⁷¹ This revelation induced the admission that “[c]ontract as a living institution is very much with us.”⁷² The yearning for complete verification, however, continues.

Just as the relationists find it difficult to provide illustrations of the static or discrete transaction, empiricists manifest insuperable difficulty in describing how their theories could be applied in a

Soc. Rev. 555 (1963) [hereinafter Macaulay, *Non-Contractual Relations*].

68. Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. Chi. L. Rev. 710 (1999) (questioning the reliance on “usages of trade” and “commercial standards” upon which much of the early work of empiricists was predicated). Professor Bernstein’s work is analyzed *infra* Part IV. Professor Macaulay recognizes the “admirable” empirical work of Professor Bernstein but suggests that Bernstein “has not studied the entire commercial world” and that there are empirically verifiable examples of business customs. His example is the “two-by-four” board which does not measure two inches by four inches—an example that has occurred to neoclassicists for the last fifty years. Stewart Macaulay, *Relational Contracts Floating On a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 Nw. U. L. Rev. 775, 787 (2000). Indeed, even the classical case literature contains numerous additional and more sophisticated illustrations. See, e.g., *Hurst v. W.J. Lake & Co.*, 16 P.2d 627 (Or. 1932). The neoclassical view of interpretation is illustrated by *Mellon Bank v. Aetna Bus. Credit Inc.*, 619 F.2d 1001 (3d Cir. 1980).

69. Professor Macaulay, *supra* note 68, at 783 n.43, mentions Professor Arthur Leff’s view that law and economics is a desert and law and society is a swamp as reported in Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* 147 (1991). See also Linda Ross Meyer, *Is Practical Reason Mindless?*, 86 Geo. L.J. 647, 652 (1998) (“Moreover, the empirical study of law is doomed to recreate the difficulties of theory: it can never capture the practices, let alone serve to regulate them, because it must redescribe and simplify them in order to make them the subject of scientific investigation. Prediction would be impossible, because it would require an account of all the factors involved in legal reasoning, and would fail for the same reason descriptive theory fails.”); Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 Va. L. Rev. 1603 (2000).

70. See Macaulay, *Non-Contractual Relations*, *supra* note 67; see also Lawrence M. Friedman, *Contract Law in America: A Social and Economic Case Study* 193 (1965) (suggesting that contract law had become “the law of leftovers”).

71. Macaulay, *supra* note 19, at 471.

72. *Id.* at 465.

pragmatic litigation context. CLS scholars do not bother to try. Relationists' efforts to suggest judicial utility are undiscoverable. Empiricists unearth additional facts or inferences in their "law-in-action" pursuits, but their work has not been assimilated in the workaday process of contracts adjudication.⁷³ It appears exclusively in their law review pieces that too often manifest mutual commiseration and congratulations.

F. Law and Economics

Another dimension is provided by the law and economics movement.⁷⁴ The fundamental concept of the exchange of enforceable promises producing geometric wealth is the necessary predicate of a market society. A collectivist state is anathema to

73. The value of the additional information provided by an empirical approach is questionable at times. Thus, in a review extolling the virtues of an earlier (1995) edition of the "Law in Action" casebook, *supra* note 67, the reviewer points to the book's treatment of the well-known case, *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962), where the court limited recovery in a contract to repair the land after strip mining to diminution in value, \$300, rather than the cost of completion of \$29,000. *Id.* at 114. The empirical investigation revealed that members of the court switched votes, the plaintiff's lawyer presented a weak case and two members of the 5-4 majority were accused of taking bribes in other cases and left the bench. There was no evidence of bribes in the instant case. The reviewer concludes, "[W]hat sorts of principles can we build on the backs of cases such as this?" William J. Woodward, Jr., *Clearing the Underbrush for Real-Life Contracting*, 24 L. & Soc. Inquiry, 99, 107 (1999). Empiricists may find it difficult to believe that neoclassicists do raise questions about the lack of proficient lawyering and the inequality of legal representation. It is not remarkable that appellate judges sometimes switch their votes (often for valid reasons) and some judges even violate their oaths (for invalid reasons). Absent this "empirical" contribution, it has not been difficult for a typical neoclassical scholar to conclude that the doctrinal analysis of the *Peevyhouse* court is outrageous, particularly since the court does report the specific agreement of the parties requiring remedial work that was not done and the fact that the plaintiffs lived on the premises. This is not to suggest that the "law-in-action" pursuits associated with the University of Wisconsin School of Law are unproductive. See, e.g., Galanter, *supra* note 19. Indeed, they can provide important and unique dimensions in legal research and scholarship as I discovered in my graduate work at Wisconsin under the guidance of such luminaries as Willard Hurst and John Stedman. Sound empirical studies are most productive when they are integrated with realistic efforts at law reform by scholars who provide courts and legislatures with proposals that constitute workable solutions.

74. The economic analysis of law ("EAL") movement is often traced to articles by Ronald Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960) (economic analysis of nuisance laws), and Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499 (1961). For a comparison of the "Chicago School" and other strands, see Nicholas Mercuro & Steven G. Medema, *Economics and the Law* (1997). The dominant scholarly figure in this effort was Professor (later Judge) Richard A. Posner whose book, *Economic Analysis of Law*, is currently in its fifth edition (1998). Law and economics scholars are often accused of promoting a return to a dangerous formalism by their concentration on "efficiency." See, e.g., Morton J. Horowitz, *Law and Economics: Science or Politics?*, 8 Hofstra L. Rev. 905 (1980); Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 Hofstra L. Rev. 775 (1981).

economic theory for the empirically verified reason that it is dysfunctional.⁷⁵ To the extent that economic theory provides a pragmatic justification for neoclassical theory, it is repugnant to the views of contracts theorists who share collectivist views. While recognizing the economic justification for a theory of contract law in a society based on atomistic exchange regulated by the highly imperfect invisible hand of the market, neoclassicists emphasize its significant limitations.

Neoclassical recognition of "efficient breach" is heavily qualified by the economists' treatment of transaction costs and the notion that contract makers focus on efficiency, devoid of other motivations such as a moral obligation to keep promises.⁷⁶ The assumption that parties will weigh transaction costs rationally and leave their contracts more or less complete depending upon such costs has an artificial flavor.⁷⁷ Similarly, the default rules that necessarily follow from this explanation require courts to focus not on what the parties to the contract "would have wanted," but what rational parties *should* have wanted in light of transaction costs, i.e., an "untailored" or "off-the-rack" default rule, rather than the more "tailored" approach suggested by the Code and Restatement (Second) of Contracts that considers the particular circumstances of the parties.⁷⁸ Notwithstanding these reservations, economic theory is a dimension of law, particularly contract law, that must be recognized in any

75. "[T]he impossibility of central planning or true socialism stems not from the impossibility of centralized direction simpliciter, but from the impossibility of using centralized direction writ large to handle the first-order problem of knowledge. It is for this reason that centrally-planned economies have, without exception, failed miserably to serve the public welfare." Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 837 (1992). "The attempt by the Soviet Union to administer the economy without the social institution of contract failed." Dietrich A. Loeber, *Plan and Contract Performance in Soviet Law*, in *Law in the Soviet Society* 128-29 (Wayne R. LaFave ed., 1965); see also 1 E. Allan Farnsworth & Viktor P. Mozolin, *Contract Law in the USSR and the United States: History and General Concept* (1987).

76. This dimension is emphasized by Charles Fried, *Contract as Promise* (1981). An argument for a qualified rational choice theory may be found in Scott, *supra* note 69.

77. Examples of transaction costs include the cost of negotiation, the cost of discovering the likelihood of certain contingencies and drafting against them as well as other legal fees. There is common sense in the view that the party who failed to take cost-justified precautions should bear the risk of incompleteness as the "least-cost-avoider," but this approach, alone, can be dangerously misleading even in terms of pure economic analysis. It must be combined with the deterrence of opportunistic behavior by a party who violates an identified norm arising from the contract or a societal norm. A systematic combination of these two approaches in a pragmatic fashion that courts could adopt has yet to occur. See George M. Cohen, *The Negligence-Opportunism Tradeoff in Contract Law*, 20 Hofstra L. Rev. 941 (1992).

78. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87 (1989) (criticizing the majoritarian, "untailored" approach and suggesting the possibility of "penalty-default rules" for efficiency-minded courts and legislatures).

modern exposition. Again, however, it is anything but a “wholly different concept” of contract law.⁷⁹ While it is an important dimension, it is not unitary truth.

III. THE NEOCLASSICIST CONTRIBUTION—TWENTY-FIRST CENTURY CHALLENGES

As the new theorists pursued their Pickwickian tomes, neoclassicists continued their efforts in the trenches to purify and enhance the social institution of contract. The genuine CLS scholars of the twentieth century were neoclassicists and they will continue that role in the twenty-first. They are anything but simple narrators of the extant law of contracts at any moment in time whose function is to preserve and protect the existing hierarchy.⁸⁰ They are quick to attack faulty judicial analyses, sometimes in strident tones. In the Corbin/Llewellyn tradition, they view doctrine with pervasive suspicion. They recognize existing rules as neither rigid nor fixed, but pliable and sometimes entirely outmoded. Unlike other theorists, however, they suggest productive changes in contract law ranging from modifications to new doctrinal paradigms constituting workable solutions that courts can understand and use. They are not mere compilers of cases, narrating the conventional wisdom. They pursue the critical function of the “academic bar,” providing their “intellectual contribution of suggesting the strand that holds—or should hold—all that has gone before together and also suggest the next step that must be taken.”⁸¹ They are willing to work from within the extant framework of practical legal reasoning and recognize that the unrealistic ideal is the enemy of the good. They recognize the value of precedent and the danger of sudden and repetitive changes in doctrine. They do not covet recognition as the creators of “wholly different concepts” or radical new theories. They write in their “native language” and reject the notion that every utterance must begin with a redefinition of the accepted meaning of terms. They recognize that their contributions are among many that may enhance the reaction of the law to the continually developing needs of society. They make no claim that they have discovered unitary truth or total solutions to the societal problem. Most important, however, they espouse hope rather than the despair of the new theorists.

79. As Professor Joseph M. Perillo emphasizes in *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 Fordham L. Rev. 1085, 1093 (2000), “efficient breach” hardly explains contract remedies.

80. For an assertion that the traditional legal scholar is nothing more than an unpaid advisor or “clerk” to the judiciary, see Balkin & Levinson, *supra* note 4, at 177.

81. Kenneth F. Ripple (Judge, United States Court of Appeals, 7th Cir.), *The Role of the Law Review in the Tradition of Judicial Scholarship*, 57 Ann. Surv. Am. L. 429, 437 (2000).

Neoclassicists recognize continuous challenges in the evolution of contract law. They sniff formalism in every tainted judicial and statutory breeze. While the tapestry of Llewellynesque leeways woven on a Corbinized fabric signaled the continuous decline of formalism, the actualization of that potential has always encountered resistance. When the tension between the certainty required for stable transactions and the desire to assure fair results in a contextualized ambience proves frustrating for courts lacking sufficient guidance from statutes or precedent, the courts may seek assistance from the work of academic lawyers. If that source proves incomprehensible or irrelevant, courts will ignore it and may find satisfaction in a formalistic response. Scholars who have no interest in serving the needs of the judiciary have no interest in serving the pragmatic needs of society.

Karl Llewellyn was willing to apply his "metatheory" to societal needs. In his effort to promote a more "decent" social institution of contract, he felt compelled to empower courts to confront oppression and unfair surprise. He understood that traditional categories such as fraud and duress were insufficient, and he saw the folly of relying on "covert tools."⁸² While recognizing that "an approach by statute [is] dubious, uncertain and likely to be both awkward in manner and deficient and spotty in scope,"⁸³ he created a confrontational device in what he conceived "as perhaps the most valuable section in the entire Code,"⁸⁴ unconscionability, to insist that *courts* create workable solutions.⁸⁵ The conclusory nature and vague contours of that provision did not deter him since he designed it exclusively as a device that would empower courts to assure a more precise and fair determination of the factual bargain by denying the imprimatur of "assent" to oppressive terms or entire contracts. The unconscionability provision was designed to allow for the elaboration of "precedent" that would provide a detailed, sufficiently certain and widely accepted analysis.⁸⁶ Further support would come from a

82. "Covert tools are never reliable tools." Karl Llewellyn, Book Review, 52 Harv. L. Rev. 700, 703 (1939) (reviewing O. Prausnitz, *The Standardization of Commercial Contracts in English and Continental Law* (1937)).

83. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 370 (1960).

84. Hearings, *supra* note 46, at 57 (statement of Karl Llewellyn).

85. U.C.C. § 2-302 (instructing courts to modify agreements, when appropriate, so as to avoid unconscionability).

86. While the Llewellyn position pervades his other writings, his rationale for the new unconscionability section of the U.C.C., § 2-302, is clearly evidenced by his explanation to the New York Law Revision Commission on the afternoon of February 15, 1954. Hearings, *supra* note 46, at 112-14. After some discussion of the statute of frauds section, U.C.C. § 2-201, though the Commission had no more questions, Llewellyn said, "May I, before I sit down, say one other thing?" *Id.* at 112. He did not await an answer before launching into an exegesis of the unconscionability section. The evil to be avoided was the practice of business lawyers who "tend to draft to the edge of the possible," insisting on "having all kinds of things that their

species of that concept, a more focused "incipient unconscionability" section that would require an extreme modification of one of the sacred rubrics of classical contract law, the "mirror image" rule.⁸⁷ Another pervasive concept designed to war against the oppression of algebraic rules would be provided through the overriding requirement of "good faith" to complete the realization of a more precise and fair approximation of the actual or presumed assent of the parties.⁸⁸ Coupled with myriad sections denouncing specific artificial barriers of classical doctrine that promoted formal analyses opposed to the ultimate goal, these pervasive principles were designed to achieve the

clients don't want at all." *Id.* at 113. Unconscionability would prevent "drafting to the absolute limit of what the law can conceivably bear. At that point, you run into what they run into now, and what you run into now is, the court kicks it over." *Id.* at 113-14. If the court will "kick it over" without any U.C.C. guidance, why did we need the unconscionability section? Llewellyn answered that courts were refusing to enforce clauses going beyond the limit of what they could bear through covert tools, i.e., courts would say that such clauses were not sufficiently clear. *Id.* at 114. Counsel would then redraft the clause to meet a standard of excruciating clarity and the court would still insist that the clause was not sufficiently clear. Llewellyn deplored such a process that "does not make for good business, it does not make for good counseling, and it does not make for certainty." *Id.* at 114. Rather, it leads "to precedent after precedent in which the language is held not to mean what it says and indeed what its plain purpose was, and that upsets everything for everybody in all future litigation." *Id.* His solution was to "bring it out into the open" and say, "[w]hen it gets too stiff to make sense, then the court may knock it out." *Id.* If courts openly confront these material, risk-shifting clauses that clearly exceed reasonable business judgment, "you are going to get a body of principles of construction instead of principles of misconstruction, and the precedents are going to build up so that the language will be relied upon and will be construed to mean what it says." *Id.* Thus, the principle of unconscionability will be elaborated exclusively by courts in well-reasoned precedents that will make drafting "to the edge of the possible" counterproductive if not unethical. *Id.* at 113. To assure the development of this body of precedent, the unconscionability section insists that "it is taken completely out of the realm of the jury. . . . That is court action, and it is reviewable. . . . [I]t makes precedents and guides." *Id.* at 114. Recognizing that judges are not familiar with the interstices of business in specific trades, subsection (2) avoids leaving the question to the "untutored imagination of courts" by allowing "all kinds of background to be presented to instruct the court." *Id.* The design was intended to produce a section "which greatly advances certainty in a now most baffling, most troubling, and almost unreckonable situation." *Id.*

87. U.C.C. § 2-207. For an analysis of the relationship between the "battle of the forms" section and the unconscionability section, see John E. Murray, Jr., *Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability*, 39 U. Pitt. L. Rev. 597 (1978). While it is common for courts to view U.C.C. § 2-207 as "rejecting" the common law "mirror image" rule of contract formation, that rule continues with respect to "dickered" terms such as the subject matter and price. Thus, it is more precise to recognize U.C.C. § 2-207 as a major modification of the "mirror image" rule.

88. Neoclassicists recognize the literal impossibility of the omniscient solution. We accept the fact that we will never have a complete understanding of the subjective intention of the parties or of all the contextual circumstances surrounding the transaction. Simultaneously, however, we reject any notion that the evidence of the contract should be relegated exclusively to words exchanged at some time in the past which allegedly produce a "plain meaning" notwithstanding a host of other factors.

Llewellyn vision of a contract law that would assure the highest recognition of the factual bargain—the contextual “agreement.”⁸⁹ The Restatement (Second) of Contracts dutifully absorbed the unconscionability provision,⁹⁰ flinched with respect to the “battle of the forms,”⁹¹ and suggested a timid framework to avoid oppressive standardized terms in the absence of a battle.⁹²

The Llewellyn vision has not been fulfilled. The wavering and blurred standards of unconscionability and good faith have yet to be assimilated in a reliable analysis.⁹³ Adumbrating numerous “elements” to determine whether a term is unconscionable⁹⁴ and applying Arthur Leff’s labels, “substantive” and “procedural,” have done little to rescue the concept from his devastating description of the Llewellyn product as nothing more than an “emotionally satisfying incantation” proving that “it is easy to say nothing with words.”⁹⁵ Attempts to overcome the oppression and unfair surprise that may result from material, risk-shifting standardized terms secreted in a maze of “boilerplate” through the doctrine of “reasonable expectations” continue essentially to be limited to insurance contracts where the doctrine originated.⁹⁶ Its contours are deemed too vague for general application. Just as formidable legal philosophers may regard definitions of “justice” as superficial though insisting that instances of manifest injustice are clearly recognizable, “good faith”

89. See John E. Murray, Jr., *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 Washburn L.J. 1 (1981).

90. Restatement (Second) of Contracts § 208 (1981). Courts recognize that this is not an “attempt to define unconscionability in a black letter rule of law.” Steinhardt v. Rudolph, 422 So. 2d 884, 890 (Fla. Dist. Ct. App. 1982).

91. Restatement (Second) of Contracts § 59 (1981); see John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 Cornell L. Rev. 735, 745-61 (1982).

92. Restatement (Second) of Contracts § 211 (1981); see Murray, *supra* note 91, at 762-79.

93. See Carol B. Swanson, *Unconscionable Quandry: UCC Article 2 and the Unconscionability Doctrine*, 31 N.M. L. Rev. 359 (2001) (tracing the judicial response to the unconscionability doctrine and the efforts to revise U.C.C. § 2-302).

94. See, e.g., Mullan v. Quickie Aircraft Corp., 797 F.2d 845, 850 (10th Cir. 1986) (listing seven elements); Wille v. Southwestern Bell Tel. Co., 549 P.2d 903, 906-07 (Kan. 1976) (listing ten elements).

95. Arthur Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. Pa. L. Rev. 485, 558-59 (1967). Professor Leff also discusses the suggested “substantive”/“procedural” dichotomy. *Id.* at 487. There is a considerable question as to its utility though it may provide psychological comfort to courts. See Murray, Contracts, *supra* note 22, at § 96[B][2][b].

96. The “reasonable expectations” concept is attributed to the work of Professor Robert E. Keeton as originally suggested in *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv. L. Rev. 961 (1970). See also Robert E. Keeton, *Basic Text on Insurance Law* 350-61 (1971). For a recent case listing jurisdictions adopting this test in relation to insurance contracts, see *Max True Plastering Co. v. United States Fidelity and Guar. Co.*, 912 P.2d 861 (Okla. 1996). For an analysis of the use of this principle in other cases especially by Arizona courts, see Murray, Contracts, *supra* note 22, at § 97[B].

may be understood principally through its absence. Its undeveloped contours, however, create an excessively cautious judicial recognition of bad faith practices.⁹⁷ Similarly, the chaos of the "battle of the forms" not only continues unabated; it has been exacerbated.⁹⁸

It is an open secret that these substantial failures are not solely attributable to deficiencies in the statutes or Restatement sections. While the deficiencies of the "battle of the forms" section are well known and the Restatement (Second) section on standardized agreements was so timid that only an analysis of its comments and related sections make any sense,⁹⁹ Llewellyn's great hope for a reasoned elaboration of the principle of unconscionability and the explicit requirement of "good faith" remains unfulfilled.¹⁰⁰ A decade of attempts to redraft the "battle of the forms" structure into a workable design and rescue it from the perils of notoriously technical and counterproductive judicial construction proves conclusively that it is much easier to criticize that product than to cure its original deficiencies. Efforts to revise and clarify the concepts of "unconscionability" and "good faith" have failed. They corroborate Llewellyn's insistence that a statutory approach is dubious and awkward. They have surrendered to the Llewellyn caveat that only courts in a "common law tradition" can provide the necessary elaboration as various revised drafts of Article 2 over the last decade clearly attest—but herein lies the rub.

While Llewellyn was emphatically realistic about the appellate judiciary, he underestimated the challenges he presented to judges who do not possess the analytical abilities and vision of a Roger Traynor or similar judicial luminaries.¹⁰¹ When a concept cannot be

97. Combined with limitations on the duty of good faith [e.g., it does not apply to pre-contractual negotiations] is spirited disagreement among the commentators over what constitutes bad faith and a tendency in the courts to resist a finding of bad faith even where the duty is imposed. The result is that the potential of the duty of good faith for contracts, not to mention relational contracts, has arguably not been realized in the United States.

Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 Nw. U. L. Rev. 823, 840-41 (2000) (citing Richard E. Speidel, *The "Duty" of Good Faith in Contract Performance and Enforcement*, 46 J. Legal Educ. 537 (1996)).

98. See Murray, *Contracts*, *supra* note 22, at § 50.

99. See *id.* at § 97[A].

100. See U.C.C. § 1-203 (the general obligation of good faith applicable to all parties), and U.C.C. § 2-103(1)(b), which applies to merchants and requires not only "honesty in fact" but "the observance of reasonable commercial standards of fair dealing in the trade." See also Speidel, *supra* note 97.

101. There are cowardly appellate judges as well as cautious ones, there are personal prejudices, there are general prejudices which reach the level of besotted bigotry, there are the sly as well as the skillful, not every appellate judge is industrious or steady in attention or careful in his work, politics and "management" can be found inside the court and out, there have even been crooks on the appellate bench. And so what? Taken all together, such things do not materially alter the

assimilated by courts, it may be distorted or ignored. Courts require functional analytical structures within their capacities. Judicial discomfort with broad and unfamiliar norms that depart from vested understanding invites a resort to formalism, which "spares the lawyer or judge from a messy encounter with empirical reality."¹⁰² The desire to achieve results that are increasingly fair surrenders to the high values of certainty, stability and finality. This judicial bias now finds support in recent scholarship reacting to the new theories.

IV. THE REACTION: NEOFORMALISM

The proclivity of courts to discover rules with sufficient certainty and predictability is now supported by a "flurry of neoformalism in contracts scholarship."¹⁰³ Neoformalists characterize Llewellyn's realism as antiformalist because obligations are said to be derived not from the language of the bargain but through an inductive process resting on "scattered empirical observations."¹⁰⁴ Llewellyn insisted that the "text" of the bargain should no longer be the sole basis for discerning obligations. Rather, "dynamic, legally unformulated, fact patterns of common life" provide an "immanent law" from which the parties' obligations are derived.¹⁰⁵ Neoformalists, however, insist that the business norms the U.C.C. directs courts to incorporate as part of the "agreement" are inefficient.¹⁰⁶ Even if such norms were efficient, courts are said to be hopelessly inept in discovering them.¹⁰⁷ Moreover, serious questions arise concerning the very existence of customary norms that can be incorporated into the agreement.¹⁰⁸ The

whole picture: the appellate bench has stood up throughout our history; taken as an institution entire, I should think it the least hypocritical of all our law-governmental institutions; in point of personal responsible conduct in office, it has earned the honor it has enjoyed; and I can see no sign that it has declined... either in character or in that responsible consciousness of office.

Karl N. Llewellyn, *The Common Law Tradition* 133 (1960). The influence of Llewellyn on Roger Traynor is traceable to the summer of 1924 when Llewellyn was Traynor's first year contracts teacher at Berkeley. See Alfred S. Konefsky, *Freedom and Interdependence in Twentieth-Century Contract Law: Traynor and Hand and Promissory Estoppel*, 65 U. Cin. L. Rev. 1169, 1172 n.9 (1997) (citing James McCall, *The Life of Roger Traynor: Reform and the Pursuit of Justice* (unpublished manuscript)).

102. Richard A. Posner, *The Problems of Jurisprudence* 41 (1990).

103. Woodward, *supra* note 5, at 1004.

104. Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. Chi. L. Rev. 781, 781 (1999).

105. *Id.* at 782.

106. Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. Pa. L. Rev. 1697, 1724 (1996).

107. See Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 Nw. U. L. Rev. 749 (2000); Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 Nw. U. L. Rev. 847 (2000).

108. Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765, 1808-11 (1996)

proposed solution, therefore, is to restrict judicial speculation by emphasizing the language of the static record of agreement.¹⁰⁹ Any further analysis of the context, the particular situation of the parties, the trade usage, their prior course of dealing or even their course of performance is in jeopardy as courts should be discouraged from any inquiry as to whether the parties did or should have understood the effect of such language under all of the surrounding circumstances. The "surrounding circumstances" should no longer be considered because the "plain meaning" of the words will be decisive and the parol evidence rule should no longer reflect Llewellynesque leeways.¹¹⁰

Do the neoformalists recommend a return to that "primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal?"¹¹¹ While they seek to distinguish themselves from the classical formalism of nineteenth century Langdellians and its "categorical imperative to deduce rules from first principles,"¹¹² their claim that "[w]e are all relationists" is not persuasive¹¹³ since their formalist view "asks that the court respect the literal and explicit terms of the contract."¹¹⁴ For the formalist or neoformalist, *the contract* is relegated to its explicit terms.¹¹⁵ They do not regard express terms as merely some evidence of *the contract*. Express terms and only express terms constitute *the contract*. Their characterization of U.C.C. provisions, however, provides clear and convincing evidence of their fundamental misconceptions.

The formalist critique strikes at the soul of the contract law of the U.C.C. and its emphasis on an anti-technical, antiformalist and relational identification of the *agreement*. "Contract" under the Code is defined in terms of effect: "the total legal obligation which results from the parties' agreement."¹¹⁶ Formalists would limit the recognition of evidence of that "total legal obligation" to express terms. They dispute Code recognition of trade usage, course of

[hereinafter Bernstein, *Merchant Law*]; see also Bernstein, *supra* note 68.

109. See Posner, *supra* note 107.

110. See Scott, *supra* note 107, at 866.

111. Judge Benjamin Nathan Cardozo, writing for the court in *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91 (1917).

112. See Scott, *supra* note 107, at 851 n.11 (citing Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. Pitt. L. Rev. 1 (1983)).

113. See Speidel, *supra* note 97, at 845 n.86 (quoting Scott, *supra* note 107, at 852). The author provides a reaction to Dean Scott's claim, see *supra* text accompanying note 107, "Nonsense." Speidel, *supra* note 97, at 845 n.86.

114. Scott, *supra* note 107, at 851 n.12.

115. It seems unnecessary to refer to this school as "neoformalism" notwithstanding differences between their rationale and the underlying philosophy of classical formalism. The results are essentially identical. Thus, the terms "formalist" and "neoformalist" are used interchangeably.

116. See U.C.C. § 1-201(11).

dealing and course of performance.¹¹⁷ They suggest that courts are authorized by the Code to “vary or trump the express terms of a written contract” by such evidence.¹¹⁸ Trade usage and course of dealing evidence, however, do not “trump” anything. Evidence of their existence makes them part of the original contract. They are terms of the original contract, though they are subservient to express terms.¹¹⁹ Formalists also misrepresent course of performance evidence as supplying “*additional* contractual provisions.”¹²⁰ In determining the meaning of express terms, the Code views course of performance as “the best indication of what that meaning was.”¹²¹ Where a course of performance differs from the express terms, it constitutes a modification or waiver of the express terms because it is a clear and current manifestation that the parties have changed their minds.¹²² Thus, course of performance evidences a new contract—a modified contract—that differs from the original contract because one or more express terms is modified or waived. The new contract—the contract as modified—is the only contract. It does not “add” terms to an existing contract. It is a total misconception to suggest that course of performance allows *courts* to *alter* the express terms of the contract.¹²³ The *parties* have formed a new contract as they are allowed to do, whether by express terms or by other clear manifestations of their intentions. It does seem a tad late in the evolution of contract theory to remind others that contracts can be formed, modified and rescinded through manifestations other than

117. *Id.* §§ 1-201(3), 1-205, 2-208.

118. See Bernstein, *Merchant Law*, *supra* note 108, at 1784; see also Ben-Shahar, *supra* note 104, at 790 (1999) (“[I]n a long line of cases courts have held that course of performance can trump conflicting terms in the contract.” (emphasis added)).

119. It is unfortunate that U.C.C. § 2-202(a) uses the term “supplemented” when it expressly recognizes such terms. Comment 2 is helpful in clarifying the concept: “Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased.” *Id.* at cmt. 2. The hierarchy is found in U.C.C. § 1-205(4): where it is not reasonable to construe express terms and unexpressed terms as consistent with each other, express terms control course of dealing and trade usage while course of dealing will control trade usage. Section 2-208(2) suggests that express terms also control course of performance, but U.C.C. § 2-208(3) allows course of performance to prevail as a modification or waiver. Section 2-208(2) should, therefore, be revised. Where it is unreasonable to construe express terms and course of performance as consistent with each other, if course of performance is established under U.C.C. § 2-208(1), it must operate as a modification or waiver of express terms. Thus, U.C.C. § 2-208(2) should be revised to recognize the superiority of express terms over trade usage and prior course of dealing, but not course of performance.

120. Bernstein, *Merchant Law*, *supra* note 108, at 1784.

121. U.C.C. § 2-208 cmt. 1.

122. See *id.* § 2-208(3).

123. Ben-Shahar, *supra* note 104. “Although it formally states that the express terms of the agreement control course of performance and course of dealing, [the Code] allows the opposite to occur.” *Id.* at 789-90. The author cites only § 2-208(2) and § 1-205(4) for this proposition, conveniently ignoring § 2-208(3) as analyzed *supra* note 119.

words. The deliberate confusion of the formalists, however, is unabated. Thus, one finds the assertion, "if a past practice is in conflict with an explicit contractual provision, the past practice will often be allowed to vary and trump the express terms."¹²⁴ The statement is predicated, however, on course of performance which is not a "past practice." It is a *current* practice under an existing contract that may provide compelling evidence of the parties' understanding of their express terms or signal their modification or waiver.¹²⁵

Formalists ignore the fact that course of performance is not arbitrarily or whimsically established. It requires "repeated occasions for performance."¹²⁶ It requires knowledge of the nature of the performance and opportunity to object to it.¹²⁷ The course of performance must be "accepted or acquiesced in without objection."¹²⁸ It constitutes a modification of express terms only where the requirements of another section are met.¹²⁹ The current case law does not skimp on these requirements.¹³⁰ Similarly, course of dealing will only be recognized where the previous conduct of the parties "is fairly to be regarded as establishing a common basis of understanding."¹³¹ Trade usage requires that any practice or method having such regularity of observance in a place, vocation or trade must justify an expectation that it will be observed with respect to the transaction in question. "The existence and scope of such a usage must be proved as facts"¹³² showing that a certain usage is "currently observed by the great majority of decent dealers."¹³³ Formalists ignore such obvious clarifications because they question the very existence of trade usage or "custom" as contemplated by the Code.¹³⁴

Empirical evidence for a return to formalism is based on explorations of the practices of trade associations like the National Grain and Feed Association¹³⁵ where efforts to codify customs

124. Ben-Shahar, *supra* note 104, at 787.

125. U.C.C. § 2-208(1).

126. *Id.* § 2-208(1) & cmt. 4.

127. *Id.* § 2-208(1).

128. *Id.*

129. *See id.* § 2-208(3) (requiring adherence to U.C.C. § 2-209).

130. *See* James White & Robert Summers, *The Uniform Commercial Code* 61 (2000).

131. U.C.C. § 1-205(1).

132. *Id.* § 1-205(2).

133. *Id.* § 1-205 cmt. 5.

134. Formalists typically fail to distinguish between common law notions of "custom," which required that a usage of trade be "ancient or immemorial" or "universal," and the Code concept, which recognizes new and current usages observed by the great majority of dealers in the trade. *See id.* § 1-205 cmt. 5.

135. *See* Bernstein, *Merchant Law*, *supra* note 108. The author describes the NGFA as an association of firms and individuals who are active in cash-markets for grain and feed. They agree to submit all disputes to arbitration under Association rules. Failure to submit a dispute to Association arbitration or failure to comply with

indicated the lack of widespread agreement among merchants as to the meaning or content of trade terms or practices.¹³⁶ The operation of these private legal systems is said to suggest “that merchants differentiate between written and unwritten customs and that their understanding of customary practices is both different from and far more nuanced than Llewellyn’s.”¹³⁷ The latter claim is not empirically verified for merchants who are not subscribers to private trade association rules. It is an argument based on speculation motivated by the apotheosis of efficiency.¹³⁸ The trade association rules and procedures are touted as models that rarely mention custom and even more rarely consider prior course of dealing or course of performance in their private adjudication of disputes. Yet, it hardly seems remarkable that an association of dealers who required decades to codify customs and practices in a closely-knit industry whose members are provided with symmetric information, whose reputations are subject to adverse publicity in their official publication, and whose disputes are adjudicated by experts in their industry (“wisemen” arbitrators),¹³⁹ would have limited use for trade usage, prior course of dealing and course of performance in their adjudications. They allocated enormous time and resources to the codification of their customs and practices to standardize them.¹⁴⁰

Following this interesting exploration, an analysis from whole cloth assumes a totally rational and sophisticated understanding of private “relational preserving norms” (“RPNs”) and “end-game norms” (“EGNs”) by merchants who do not enjoy the advantages of a tightly-knit trade association.¹⁴¹ Such parties may use an RPN or EGN depending upon their goals at different points in their contractual relationship. Fearing that courts may unwittingly convert an RPN into an EGN by treating the RPN as a modification of the contract via the Code’s course of performance directive, the Code’s search for “immanent business norms” may produce “a number of undesirable effects.”¹⁴² The most prominent “undesirable effect” is illustrated by a

its decision will be reported in the widely disseminated Association newsletter and may result in the non-complying member’s suspension or expulsion from the Association. *Id.* at 1771-72.

136. Bernstein, *supra* note 68, at 715.

137. *Id.* at 716.

138. “[T]he arguments presented here, together with the empirical evidence from the NGFA arbitration system . . .” Bernstein, *Merchant Law*, *supra* note 108, at 1821 (emphasis added).

139. These are similar to the “merchant courts” that Llewellyn unsuccessfully advocated.

140. See Richard A. Epstein, *Confusion About Custom: Disentangling Informal Customs from Standard Contractual Provisions*, 66 U. Chi. L. Rev. 821, 824 (1999).

141. RPNs seek to preserve the relationship through private, cooperative, legally unenforceable, flexible adjustments. EGNs, however, are employed when a party decides to view conduct as a breach and contemplates litigation.

142. Bernstein, *Merchant Law*, *supra* note 108, at 1820.

seller who would be willing to accept late payments on occasion (an RPN) but would be unwilling to *promise* to accept late payments because the buyer may take opportunistic advantage of such an enforceable commitment. Because a court could find the acceptance of late payments to be a course of performance that modified the express terms of the original contract, the seller may be unwilling to accept a late payment more than once because the seller does not wish to be subject to the buyer's potential opportunism to which the seller would employ an EGN. "Thus, the Code's course of performance provision reduces the likelihood that transactors in ongoing relationships will flexibly adjust their contractual obligations, even in situations where it would be desirable for them to do so."¹⁴³ This is characterized as the Code's unwitting promotion of the "rigidity effect."¹⁴⁴

Beyond the lack of any empirical verification that the typical seller thinks in such sophisticated terms, one might suggest that the fear of any rare seller who does think this way can be ameliorated through the insertion of a common antiwaiver clause in the contract. Not so, say the formalists. They point to what they apparently view as a startling example of a court waiving an antiwaiver provision under a course of performance banner. Neoclassicists are not surprised to discover the authority for this claim. It had to be *Westinghouse Credit Corp. v. Shelton*.¹⁴⁵ Shelton bought a mobile home for which he agreed to pay \$22,662.72 in 144 installments due on the twenty-fifth day of each month.¹⁴⁶ The seller's rights were assigned to Westinghouse, to which Shelton made some forty payments from June 1974 through December 1977.¹⁴⁷ Only one or two of the forty payments were timely, while the others were late by one to three months.¹⁴⁸ Westinghouse accepted payments even after Shelton's checks bounced during this multi-year period.¹⁴⁹ The contract contained an antiwaiver clause and the district court granted the Westinghouse motion for summary judgment.¹⁵⁰ Apart from the antiwaiver clause, there was no doubt that Westinghouse waived its right to timely payment in accepting so many payments so late over so long a period. The only question was whether under such extreme circumstances Westinghouse had waived the antiwaiver clause *to the extent of requiring notice to Shelton that the clause would be restored*. There was a vigorous factual dispute as to whether Westinghouse had

143. *Id.* at 1809.

144. Ben-Shahar, *supra* note 104, at 795 (citing Bernstein, *Merchant Law*, *supra* note 108, at 1808).

145. 645 F.2d 869 (10th Cir. 1981).

146. *Id.* at 870.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

notified Shelton that it was retracting its waiver.¹⁵¹ Westinghouse argued that no retraction was necessary since an antiwaiver clause cannot be waived.¹⁵² The court recognized a split of authority over this issue, but reversed the summary judgment because “Shelton should have the opportunity to prove . . . that Westinghouse’s conduct in toto regarding timeliness was so pervasive that in the eyes of a reasonable debtor it ‘spoke louder than [the] word.’”¹⁵³ Under these situation-specific circumstances, if Westinghouse was found to have waived the antiwaiver clause, the factual issue of whether Westinghouse notified Shelton of its insistence on strict adherence to the payment term would bear on whether Westinghouse retracted its waiver, thereby restoring the operative effect of the antiwaiver clause that the court emphatically recognized as an enforceable clause.

The formalist does not present the circumstances of this case. Rather, the citation is presented as evidence of a court arbitrarily ejecting an express term of the contract via course of performance, thereby failing to treat the precise word as talismanic.¹⁵⁴ It would be embarrassing for a formalist to present these facts. A theory of contract law that would have a court ignore the context in a case like *Shelton* has no redeeming virtue.

151. *Id.* at 871-72.

152. *Id.* at 872-73.

153. *Id.* at 874 (citing *Van Bibber v. Norris*, 404 N.E.2d 1365, 1374 (Ind. Ct. App. 1980)).

154. It is not surprising that formalists reject such a characterization. Thus, Dean Scott contends, “Formalist interpretation is not an inflexible and wooden application of arid first principles—the criticism launched so successfully at the early formalists.” Scott, *supra* note 107, at 874. He suggests that if courts apply a literal interpretation and avoid their fallacious contextual frolics, then parties can be protected against exploitation by “[I]ndustry-specific rules.” *Id.* at 874. “[S]ocial norms of trust, reciprocity, and conditional cooperation” are also suggested as a way to deter such behavior. *Id.* at 861. Moreover, “[w]ell-developed doctrines of unconscionability are available” to protect the exploited, and such legislatively mandated boilerplate as U.C.C. § 2-316(2), which requires certain formalities to disclaim the implied warranty of merchantability (i.e., conspicuousness and the word “merchantability”), “generates (over time) standardized invocations for shifting common legal risks.” *Id.* at 874. The author envisions a society filled with industry-specific rules and model behavior based on extra-legal norms of trust and reciprocity. If this is an accurate reflection of society, the need for judicial policing is reduced to the most egregious behavior. The apparent thesis is that such a society would be produced by a rigid formalism. The suggestion that “[w]ell-developed doctrines of unconscionability are available” is a revelation to neoclassicists who worry about the continuous erosion of the unconscionability doctrine. *Id.* The requirements of U.C.C. § 2-316(2) certainly have generated a standardized invocation for shifting common legal risks. Sellers regard such requirements as a “safe harbor” device to ensure that the disclaimer of the implied warranty of merchantability will be the standard in lieu of the fundamental norm of merchantability. Thus, the deviation from the norm has become the norm as sellers have succeeded in shifting this quintessential risk to buyers, unless, of course, the buyer has superior bargaining power and will not deal on that basis. Thus, only the exploitable buyer suffers the detriment of this “legislatively mandated boilerplate.” *Id.*

The formalist analysis bristles with similar misrepresentations: "Even an express 'merger clause,' stating that the writing constitutes the entire agreement between the parties, may not bar the introduction of conflicting information through evidence of past practices."¹⁵⁵ The case allegedly supporting this proposition reveals that a disclaimer of warranty failed to meet the conspicuous requirement of U.C.C. § 2-316(2), and the court refused to recognize a *boilerplate* merger clause to preclude parol evidence of an oral express warranty.¹⁵⁶ Would formalists really insist on the enforcement of every inconspicuous, boilerplate, material risk-shifting clause without any review of the circumstances? In resisting such a rigid formalism, neither these nor other cited cases support the view that courts are engaged in some kind of wild speculation based on "scattered empirical observations."¹⁵⁷ When, however, a formalist resorts to

155. Ben-Shahar, *supra* note 104, at 790.

156. Seibel v. Layne & Bowler, Inc., 641 P.2d 668, 670-71 (Or. Ct. App. 1982). Courts recognize the difference between pre-printed (form) merger clauses and "handcrafted" clauses and retreat from providing conclusive effect to such clauses. See, e.g., Sierra Diesel Injection Serv. v. Burroughs Corp., 874 F.2d 653, 656 (9th Cir. 1989); Eberhardt v. Comerica Bank, 171 B.R. 239, 243 (E.D. Mich. 1994); Zinn v. Walker, 361 S.E.2d 314 (N.C. Ct. App. 1987).

157. See Ben-Shahar, *supra* note 104, at 781; *id.* at 790-91 (citing cases). In a footnote, Ben-Shahar merely cites *Van Bibber v. Norris*, 404 N.E.2d 1365 (Ind. Ct. App. 1980). Ben-Shahar, *supra* note 104, at 791 n.42. The facts are not disclosed because they would lend no support to the assertion. A bank accepted late payments on a mobile home fifty-seven of fifty-nine times. *Van Bibber*, 404 N.E.2d at 1370. Without notice, it foreclosed on its security interest, and the court refused to enforce a non-waiver clause under these circumstances without notice that the secured party would no longer be indulgent. *Id.* at 1373-74. The author disapproves of *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772, 794 (9th Cir. 1981), because the court found that only two acts were sufficient to constitute a course of performance, ignoring the additional fact that there were only two possible occasions to demonstrate adherence to a particular mode of performance and the trade usage was universally recognized in the industry. Ben-Shahar, *supra* note 104, at 796 n.58. Instead of wild judicial speculation as charged by formalists, if anything, courts have been relatively timid in their reactions to Llewellyn's invitation to use contextual tools, while emphasizing the usual cases suggesting a "liberal" interpretation of the use of trade usage, course of dealing or course of performance. See *Carter Baron Drilling v. Badger Oil Corp.*, 581 F. Supp. 592, 596-98 (D. Colo. 1984) (comparing cases such as *Nanakuli* and *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971) with other cases that have been "less generous" in their willingness to find "consistency" between express terms and trade usage where the express terms may be viewed as literally inconsistent). Formalists fail to mention the cases where courts insist on providing operative effect to the literal terms of the contract. See, e.g., *Lupien v. Citizens Utilities Co.*, 159 F.3d 102 (2d Cir. 1998); *Hazen First State Bank v. Speight*, 888 F.2d 574 (8th Cir. 1989); *Luria Bros. & Co. v. Piolet Bros. Scrap Iron & Metal, Inc.*, 600 F.2d 103 (7th Cir. 1979); *All Angles Constr. & Demolition, Inc. v. Metro. Atlanta Rapid Transit Auth.*, 539 S.E.2d 831 (Ga. Ct. App. 2000); *Bodine Sewer, Inc. v. Eastern Ill. Precast, Inc.*, 493 N.E.2d 705 (Ill. Ct. App. 1986). They also fail to mention cases which recognize the exclusion of implied warranties by course of performance. E.g., *Oregon Bank v. Nautilus Crane & Equip. Corp.*, 683 P.2d 95 (Or. Ct. App. 1984) (recognizing U.C.C. § 2-316(3)).

characterizations such as “course of performance and its ilk,”¹⁵⁸ the absence of an objective analysis is not remarkable.

Another formalist strike concerns judicial competency. The most extreme expression of the formalist view is that judges are “radically incompetent” to deal with relational norms.

Courts cannot read parties’ intentions from context, so they rely on the forms the parties choose. There is no evidence for the modern conviction that judges can reliably determine intentions. And although courts are not as formalistic as they used to be, there is no reason to believe that this trend is desirable¹⁵⁹

The analysis concludes that courts should be precluded from any inquiry into contextual and other relational norms. They should leave these matters to be determined by “social norms of trust, reciprocity, and conditional cooperation that also regulate relational contracts. Under the formalist approach, these norms would not be legally enforceable contract terms . . . but they nevertheless would be enforced by social sanctions that would effectively constrain the parties’ incentives to exploit changed circumstances strategically.”¹⁶⁰

This assertion, however, contradicts the later empirical view of contracting behavior with which the relationist would presumably agree.¹⁶¹ Formalists insist that Llewellyn’s “functional” contract law failed because it is based on an assumption of competent courts and incompetent parties while the actual empirical condition that is alleged to prevail reveals competent parties and incompetent courts.¹⁶² Thus, courts operate effectively only “within tightly constrained, formal modes of analysis.”¹⁶³ They should be concerned only with “the form that parties must satisfy in order to convey their desire that a court intervene if a dispute arises,”¹⁶⁴ and their intervention is necessary only to deter “high-value opportunism,” and then only if certain conditions are met.¹⁶⁵

158. Ben-Shahar, *supra* note 104, at 796.

159. Posner, *supra* note 107, at 770.

160. Scott, *supra* note 107, at 861 (citation omitted).

161. The modified empiricist conviction asserts that relational and other informal sanctions “do not always produce cooperation or happy situations. Trust can be misplaced,” thus requiring contract as a living institution to be “very much with us.” Macaulay, *supra* note 19, at 471; *see supra* notes 68-70.

162. “I assume that courts are *radically incompetent* when it comes to meeting the demands that are placed on them by relational contracts.” Posner, *supra* note 107, at 754.

163. Scott, *supra* note 107, at 876.

164. Posner, *supra* note 107, at 771. The author suggests, “A historical example is the seal.” *Id.*

165. “Radically incompetent” courts can perform this role only under the following conditions: “the promisor . . . must receive a higher payoff from performing than by breaching and incurring litigation cost;” “the promisee must . . . gain more (future business) by maintaining a reputation for toughness than by avoiding the cost of litigation;” “third parties must have at least partial information about who engaged in

If formalists are correct in their assumption that parties would prefer to leave all contextual matters to their private, extra-legal norms, why do parties fail to make that choice? If competent parties desire to preclude any judicial consideration of trade usage, course of dealing or other contextual matters, one would expect to discover a clause in virtually all merchant contracts "carefully negating" this "immanent law" from their contracts.¹⁶⁶ The dearth of such exclusionary clauses in the real world is sound empirical evidence that the entire formalist structure is predicated upon a foundation of sand, and even the sand is undiscoverable.¹⁶⁷ The notion that it is difficult to opt out of Code provisions that allow for the current adjudicative approach is baseless.¹⁶⁸ There is nothing in the Code or case law to

opportunism if opportunism occurred;" and "the court [must be able to] determine whether the parties intended to be legally bound with greater-than-zero accuracy." *Id.* at 767-68. *But see* Karen Eggleston, Eric A. Posner & Richard Zeckhauser, *The Design and Interpretation of Contracts: Why Complexity Matters*, 95 Nw. U. L. Rev. 91 (2000). The authors state,

There may be a valuable role for moderately aggressive courts in terms of filling in gaps in contracts under certain circumstances . . . This conclusion, to be sure, depends on our assumption that courts are reasonably competent, and can sort out the competing accounts offered by parties about why a contract takes the form that it did. If this assumption is incorrect, courts should adopt the more passive stance advocated by Scharwitz [enforcing the contract literally]. But it is not clear whether this assumption is correct or incorrect.

Id. at 131.

166. Comment 2 to U.C.C. § 2-202 recognizes the freedom of the parties to do so. "Unless carefully negated [trade usage and prior course of dealing] have become an element of the meaning of the words used." U.C.C. § 2-202 cmt.2. Moreover, the general rule of the U.C.C. is that the provisions of the Code may be varied by agreement. *Id.* § 1-102(4) & cmt. 3.

167. The dearth of illustrations from the case law does not suggest that a clause negating trade usage or prior course of dealing is unenforceable. See *CS First Boston Ltd. v. Behar*, No. 94 Civ. 7167, 1995 U.S. Dist. LEXIS 21036 (S.D.N.Y. June 4, 1995), which upheld such a clause and, incidentally, also upheld a no-oral-modification and a no-oral-waiver clause. The dearth of illustrations is empirical evidence of the fact that parties ordinarily do not choose to negate trade usage and prior course of dealing.

168. See Bernstein, *Merchant Law*, *supra* note 108, at 1785 (recognizing the power of parties to exclude Code provisions such as trade usage and course of dealing but claiming that it is difficult for them to do so with sufficient certainty). The author suggests no support for this assertion. See *id.* If formalism prevailed, Dean Scott insists, then parties may decide to "opt out of formalism (by appropriately clear contractual language) and choose instead more contextualized forms of interpretation." Scott, *supra* note 107, at 875. If formalism prevailed, the notion that parties could instruct courts that no longer consider context to return to the present contextual ambience borders on the absurd as contrasted with the present power of the parties to instruct courts to ignore context. The formalist cannot understand why an express term, alone, does not operate to negate trade usage, prior course of dealing or course of performance. In fact, express terms *do* control trade usage and course of dealing. U.C.C. §§ 1-205(4), 2-208(2). How express terms could or should control course of performance that cannot occur until *after* the terms are expressed, formalists do not attempt to explain. Section 2-208(3) of the U.C.C. necessarily recognizes that such course of performance may evidence a modification or waiver of the prior express terms. Formalists will point to an isolated opinion such as *Nanakuli* or

preclude parties from excluding trade usage or course of dealing. Moreover, a tightly-drafted negotiated merger clause will be enforced to preclude any prior or contemporaneous evidence.¹⁶⁹ A clause precluding oral modifications will also be enforced, though the formalist will raise the possibility that the parties may have evidenced their intention to waive such a clause and courts would enforce such a waiver unless the clause had been reinstated before one of the parties relied.¹⁷⁰ This is another illustration of the formalist fallacy that waivers “alter” or “trump” the talismanic word. The parties may, of course, avoid any judicial intervention by expressly negating any intention to be legally bound. According to the formalists, the only risk they would assume is the inability of their otherwise powerful extra-legal norms to deter “high-value opportunism.”¹⁷¹ It is no answer to raise the bar of transaction costs to effectuate any or all of these results since such costs would be modest. Notwithstanding the availability of these obvious devices, the formalist would recommend legislatively mandated certainty:

[T]he Code should be amended to include a ‘safe harbor’ provision that would give merchant-transactors a simple and reliable way to either opt out of the Code’s adjudicative approach or selectively opt out of its usage of trade, course of performance, or course of dealing provisions. Such a safe harbor would enable merchant-transactors to select their preferred degree of contextualized adjudication and would transform the Code’s quasi-mandatory interpretive approach into a default approach that merchant-transactors could avoid when they found it advantageous to do so.¹⁷²

“[L]egislatively mandated boilerplate”¹⁷³ allegedly minimizes the burden placed upon allegedly incompetent courts. Like the historic seal,¹⁷⁴ legislatively approved language would allow for robotic determinations of the enforceability of a clause. Courts would be required to jettison interpretation or construction as well as background or context and simply enforce or refuse to enforce a clause based exclusively upon adherence to the talismanic word. The entire Code could be filled with “safe harbors” that would ensure

Shelton without elaboration of the particular facts, to allege that courts have not followed U.C.C. directives.

169. Absent such circumstances as fraud, unconscionability or mistake, a clause that expressly states that the writing is the final, complete and exclusive statement of the parties’ intention will be given conclusive effect. *See Childers Oil Co., v. Exxon Corp.*, 960 F.2d 1265, 1270 (4th Cir. 1992); *see also Telecom Int’l Am. Ltd. v. AT&T Corp.*, 67 F. Supp. 2d 189, 202 (S.D.N.Y. 1999) (giving an “unequivocal integration” clause conclusive effect).

170. *See* U.C.C. § 2-209(5) (allowing the reinstatement of a waived term prior to reliance by the party against whom such a term would operate).

171. Posner, *supra* note 107, at 762.

172. Bernstein, *Merchant Law*, *supra* note 108, at 1821.

173. Scott, *supra* note 107, at 874.

174. *See supra* note 164.

against the current adjudicative approach, thereby assuring the demise of the informal contract as we know it. Beyond the obvious "safe harbors" in the current Code, there are additional Code provisions that have been construed as legislatively mandated safe harbors with less than desirable effects. It is appropriate to consider a conspicuous example.

The most controversial section of Article 2 of the Code is the infamous "battle of the forms" section, section 2-207, which will not be rehearsed since it has been subject to extensive, and sometimes superfluous, scholarly analysis.¹⁷⁵ It is important, however, to remember that, like other Llewellyn pronouncements, it was presented essentially as a principle rather than a set of rules:¹⁷⁶ "(2)

The additional terms are to be construed as proposals for addition to the contract and between merchants become part of the contract unless they materially alter it or notification of objection to them has already been given with a reasonable time."¹⁷⁷ When New York Law Revision Commission Executive Director John W. MacDonald queried Llewellyn about U.C.C. § 2-207 in 1954, the 1952 draft of that section before the Commission contained the extant subsection (1) without the last proviso, "unless acceptance is expressly made conditional on assent to the additional or different terms."¹⁷⁸ A comment, however, stated, "unless the acceptance is made conditional on the acceptance of the additional terms," i.e., it did not say, "*expressly* made conditional."¹⁷⁹ MacDonald sought an explication of the comment language since he could find nothing in the section language manifesting this qualification.¹⁸⁰ Llewellyn explained that the comment referred to

the first line of subsection (1), i.e., "A definite and seasonable expression of acceptance . . . the word 'acceptance' in the first line of subsection (1). We don't see how that can be an expression of acceptance which says, 'This is not an acceptance unless you take the terms that we put here in addition.'"¹⁸¹

175. For a current analysis, see Murray, Contracts, *supra* note 22, § 49.

176. The 1952 version presented to the New York Law Revision Commission read as follows:

§ 2-207. Additional Terms in Acceptance or Confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon.

Hearings, *supra* note 46, at 33.

177. *Id.*

178. U.C.C. § 2-207(1).

179. *Id.* § 2-207(1) cmt. 2.

180. Hearings, *supra* note 46, at 116.

181. *Id.* at 117. One of the fundamental flaws in the analyses of U.C.C. § 2-207 for nearly a half century has been the failure to emphasize and elaborate the fundamental and critical requirement of a "definite expression of acceptance," notwithstanding

While Llewellyn saw no need to include the comment language in the section, MacDonald indicated concern over different constructions of section and comment language. This induced an impatient response from Llewellyn, who recognized the power of the Commission to include such comment language in the section but emphatically cautioned against such a change: "But, for the love of heaven, Mr. MacDonald, go slow on the drafting—go slow on the drafting!"¹⁸²

Llewellyn's caution was ignored as evidenced by the current U.C.C. § 2-207 that includes the former comment language, tacked on to U.C.C. § 2-207(1).¹⁸³ The incredible judicial construction of the section ensued.

Accepting the iconoclastic mandate that U.C.C. § 2-207 "rejected" the classic "mirror image rule" to the extent that a response to an offer containing variant, undickered terms would constitute an "acceptance" rather than a counter offer,¹⁸⁴ courts had to decide what language in a response would constitute a counter offer. While a clear statement that the response is a "counter offer" would be recognized, sellers are reluctant to make such statements for fear of losing a sale.¹⁸⁵ The typical boilerplate in acknowledgment forms was surreptitious, e.g., "The acceptance of your order is subject to the terms and conditions on the face and reverse side hereof"¹⁸⁶ When such language was deemed insufficiently clear to constitute a U.C.C. § 2-207 counter offer,¹⁸⁷ it required little imagination to draft a "safe harbor" counter offer pursuant to the MacDonald amended version of U.C.C. § 2-207(1): "Seller's acceptance is . . . expressly conditioned on Buyer's assent to the additional or different terms and

different or additional terms. As evidenced by Mr. MacDonald's concerns, the concept of an acceptance containing variant terms was especially difficult to assimilate. Llewellyn, of course, viewed it as perfectly obvious. If a response to an offer appears to a reasonable offeror to be an acceptance, it should *operate* as an acceptance, notwithstanding variant terms. If, however, the response clearly states that the offeree will agree only if its terms are part of the contract, i.e., the response conditions acceptance on the terms of the response, it is clearly not a definite expression of acceptance and must be a counter offer. Llewellyn believed that a mere reminder of this obvious construction in a comment would be quite sufficient.

182. *Id.* at 182.

183. See 1 State of New York Law Revision Commission Report: Study of the Uniform Commercial Code, 390-94 (1955).

184. The classical "mirror image" rule was not "rejected." Even courts using that language would recognize that an offer to sell 1000 widgets at \$10 per widget would not be accepted by a response agreeing to take 500 widgets or 1000 smidgets or 1000 widgets at \$8 per widget. Such a response would not be a "definite and seasonable expression of acceptance" as required under U.C.C. § 2-207(1). When, therefore, there is a difference in "dickered" terms, the "mirror image" rule lives.

185. My empirical verification for this statement is based upon numerous discussions with sellers and their lawyers who confess, "It would never get by the marketing department."

186. *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1164 (6th Cir. 1972).

187. *Id.* at 1164-65.

conditions set forth below and printed on the reverse side.”¹⁸⁸ Characterizing such a response tracking the statutory language as a counter offer rejected both the sensible doctrine that an offeror should not be placed in the position of attempting to decipher an equivocal response and the attendant guide that the effect of any response to an offer must be determined according to the reasonable understanding of the offeror—neither of which Llewellyn had any intention of changing. Nonetheless, courts insisted that such an “ambiguous” formula response had to be a counter offer whenever an offeree used the statutory “safe harbor” language.¹⁸⁹ Having performed its duty of fidelity to a legislatively mandated “safe harbor,” practical legal reasoning raised the specter of fairness and purposive interpretation requiring courts to cure the effects of rigid adherence to this standard. A reasonable offeror would not understand an ambiguous response as a counter offer with the attendant effect of subjecting the offeror who accepted the goods to the “last shot” terms of the offeree, thereby emasculating the entire purpose of U.C.C. § 2-207. To remedy the effects of the formal “safe harbor,” they issued a judicial ukase rejecting another rule that Llewellyn had no intention of changing, the common-law rule that acceptance of goods in response to a “true” counter offer is an acceptance of the terms of the counter offer. While it would be oppressive to hold the offeror to the terms of an ambiguous counter offer, the very notion of an “ambiguous counter offer” is an oxymoron. Compelled to call such a response a counter offer, the judicial cure was to demand that only an “express” acceptance of the terms of such an “ambiguous counter offer” would allow the offeree’s different or additional terms to become part of the contract (a “covert tool”).¹⁹⁰ Unconscious application of this “precedent,” however, has been extended to perfectly clear and understandable counter offers which are not accepted by the acceptance of the goods. The prevailing case law now insists on express language of assent to a

188. *S. Itoh & Co. v. Jordan Int’l Co.*, 552 F.2d 1228, 1232 (7th Cir. 1977). The “safe harbor” is ineffective unless it sufficiently tracks the language of the last proviso of § 2-207(1). *See Dorton*, 453 F.2d 1161.

189. *Itoh*, 552 F.2d at 1238 (“[T]he seller injected ambiguity into the transaction by inserting the ‘expressly conditional’ clause . . .”).

190. *Id.* A party making a formula counter offer is bound to no contract and may “walk away” from the transaction unless the original offeror has expressly assented to the terms of the counter offer. If an offeree-seller merely ships the goods and the offeror-buyer accepts the goods, the terms of the contract are governed by U.C.C. § 2-207(3), incorporating the matching terms of the exchanged forms that otherwise did not form a contract, and eliminating non-matching terms leaving gaps to be filled by the “supplementary” terms of U.C.C. Article 2. Not surprisingly, there is no recorded instance of a buyer expressly accepting the seller’s counter offer terms since the buyer (and the seller) typically assume that a contract had been formed by the exchange of forms.

counter offer of pristine clarity.¹⁹¹ To overcome the unfairness of the “safe harbor,” the judicial remedy seemed desirable but was unconsciously converted into another formality. The unwitting triumph of formalism was complete. If Mr. MacDonald had followed Llewellyn’s advice to “go slow on the drafting,” it is at least possible that courts would have been forced to pursue the kind of analysis that formalists reject and this tortured history may have been avoided.¹⁹²

A recent illustration of a formalist victory attributable to instrumentalist efficiency is found in cases affording blanket operative effect to standardized terms, without opportunity to review them before the contract appears to have been made, and with the express recognition that silence will constitute acceptance of such terms. In a swashbuckling *tour de force* that dangerously misinterprets legislation and precedent,¹⁹³ the court created a new concept of “rolling” or “layered” contract formation where the contract is not made when the parties thought it was made, but only after a buyer will be said to have

191. See, e.g., *Ralph Shrader, Inc. v. Diamond Int’l Corp.*, 833 F.2d 1210, 1215 (6th Cir. 1987), where the court said that a response to an offer could be “no clearer in conditioning acceptance than it was in stating, ‘The terms set forth on the reverse side are the *only ones upon which we will accept* orders: These terms superseded all prior written understandings, assurances and offers.’” *Id.* Yet, only an express assent by the offeror rather than merely accepting the goods will be necessary to accept such a clear counter offer. For an interesting though failing effort to convince a court that the formula language is ambiguous and should not be viewed as a counter offer, see *PCS Nitrogen Fertilizer, L.P. v. Christy Refractories, L.L.C.*, 225 F.3d 974 (8th Cir. 2000). See also *White Consol. Indus., Inc. v. McGill Mfg. Co.*, 165 F.3d 1185 (8th Cir. 1999).

192. Unfortunately, this is not the only U.C.C. § 2-207 pathology that is attributable to a formalist interpretation of the statute. For an illustration of the difficulty created by a strict interpretation of U.C.C. § 2-207(2) that expressly includes only “additional” but not “different” terms, see *Northrop Corp. v. Litronic Industries*, 29 F.3d 1173 (7th Cir. 1994), where the opinion by Judge Posner indicates a preference for a workable interpretation but surrenders to the probability that Illinois courts would follow the literal prevailing view. See Murray, *Contracts*, *supra* note 22, § 50[E].

193. The two leading cases are *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), and *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), where Judge Easterbrook wrote both opinions for the court. Insisting that the holding is based on the common law of contracts and contract formation sections of the U.C.C., the opinions ignore references to numerous cases that refused to enforce post-formation limitations of buyers’ rights. In attempting to distinguish *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991), a case denying enforceability to such post-formation terms, *ProCD* suggests that U.C.C. § 2-207 applies only to merchants, a clear misinterpretation of the language of U.C.C. § 2-207(2) and interpretations thereof. See *ProCD*, 86 F.3d at 1452. Many cases recognize that the first sentence of U.C.C. § 2-207(2), which treats additional terms as “proposals,” must apply only to a contract involving a non-merchant since the second sentence and the subsections that follow apply to contracts “between merchants.” Even more troublesome is the superficial notion that U.C.C. § 2-207 applies only where there are two conflicting forms, which ignores the U.C.C.’s application where a single confirmation containing variant terms follows an oral contract for the sale of goods to which U.C.C. § 2-207 clearly applies. See *Dorton*, 453 F.2d 1161. For a comprehensive analysis see Murray, *Contracts*, *supra* note 22, § 50(I).

accepted by silence the seller's post-purchase terms "inside the box," thereby assuring an "efficient" result.¹⁹⁴ There is, however, no escape from the necessary determination of whether the standardized terms to which a party will be said to have assented are fair and this standard cannot be applied mechanically.¹⁹⁵ Ironically, this "rolling" or "layered" contract theory may be viewed as "relational" though the true relationist would reject any such characterization as heretical. Meanwhile, the American Law Institute ("ALI") approved a revised version of U.C.C. Article 2 only to have it summarily dismissed by the National Conference of Commissioners on Uniform State Laws ("NCCUSL").¹⁹⁶ A new committee created "proposed amendments" rather than a revised Article 2 that expressly avoid criticism of the "rolling" contract decisions since it might alarm the strong sellers who dominate the approval process.¹⁹⁷ Simultaneously a legislative

194. The terms are not revealed until the buyer opens the box or uses a computer disk and sees the terms flash on the screen. The court justifies the enforceability of "inside the box" terms on the footing that printing the terms on the outside of the box is cumbersome. With respect to telephone sales, the court presents the absurd scenario of a seller's operator reading contract terms to the prospective buyer. In *ProCD*, there was a fine print statement relating to terms inside the software container. *ProCD*, 86 F.3d at 1450. In *Hill v. Gateway*, there was no mention of terms during the telephone order or on the container. *Hill*, 105 F.3d at 1150. A conspicuous notice on the outside of a box stating that the purchase is conditioned on acceptance of terms inside the box does not appear cumbersome. Nor would it be cumbersome for a telephone operator in a "1-800" sale to mention that the buyer will be bound to terms inside the container. There is some anecdotal evidence that this practice has begun.

195. See *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (App. Div. 1998) where, after the purchase, a copy of Gateway's "standard terms and conditions" arrived with the container stating, "By keeping your Gateway 2000 computer system beyond thirty (30) days after the date of delivery, you accept these Terms and Conditions." *Id.* at 570. The document contained sixteen paragraphs. Paragraph 10 was a "dispute resolution" provision subjecting the parties to the rules of the International Chamber of Commerce (located in France) with the arbitration to be held in Chicago. A claim of less than \$50,000 required an advance arbitration fee of \$4000, a sum greater than the cost of most Gateway products, and \$2000 of this fee was nonrefundable. The court adopted the *ProCD/Hill* analysis holding that the contract was not formed when the buyer purchased the computer but only with the retention of the computer beyond the thirty days specified in the terms and conditions. The court, however, recognized the obvious substantive unconscionability of an oppressive arbitration process but confronted the obstacle that precedent required both procedural and substantive unconscionability before concluding that substantive unconscionability, alone, could make the clause inoperative. *Id.* at 569.

196. For a candid view of this "debacle," see Richard E. Speidel, *Revising U.C.C. Article 2: A View From the Trenches*, 52 Hastings L.J. 607 (2001).

197. The Proposed Amendments to Uniform Commercial Code Article 2-Sales (2002) were approved at the 2002 NCCUSL meeting. The National Conference of Commissioners on Uniform State Laws, 2002 Annual Meeting Draft, *available at* <http://www.law.upenn.edu/bll/ulc.htm>. The "battle of the forms" section has undergone substantial revision that seeks to avoid the maladies of its predecessor by eliminating issues of contract formation which are left to other sections, recognizing terms only if they appear in the "records" of both parties or by other express agreement, eliminating any distinction between different or additional terms or

NCCUSL miscreant sanctioned the “layered contract” analysis and other extant practices of a specific industry in an abominable “uniform law” that guarantees non-uniformity while lending support to the CLS hymn that everything is politics and power.¹⁹⁸ These and other examples of formalism can only be resisted by a rejuvenated effort to promote a theory of contract law within a realistic adjudication context.

V. PRACTICAL LEGAL REASONING

The quintessential error of the theorists is their unwillingness to accept the reality of practical reasoning. They have created “a distinctive and abstract discipline of their own that seems largely disconnected from the ways in which real lawyers and judges act.”¹⁹⁹ They necessarily “look down on the discourse of legal practice with a mixture of incomprehension and disdain.”²⁰⁰ They yearn for a more scientific and instrumentalist approach that would dictate certain conceptions of law and social policy. An instrumentalist formalism with the singular goal of free-market efficiency competes with the equally instrumentalist social science visions that would require

material or immaterial terms, and generally allowing courts greater discretion to determine which terms shall be operative. The Statute of Frauds (U.C.C. § 2-201) has been modified to raise the threshold to \$5000, clarify the “admissions” exception by expressly allowing admissions made in depositions and, like its counterpart in § 8-113 (Investment Securities), eliminate the one-year provision of the Statute of Frauds. Two new sections, U.C.C. §§ 2-313A and 2-313B, provide guidance in recognizing express warranties for remote purchasers and protection for “remedial promises” that often attend warranties. Three new sections, U.C.C. §§ 2-211 through 2-213, recognize electronic contracts, consistent with the Uniform Electronic Transactions Act (“UETA”). A warranty disclaimer effected by “as is” or “with all faults” must be conspicuous in a consumer transaction and statutorily prescribed language is required as an alternative disclaimer in such contracts. A new right is created for consumers to recover identified goods after making a down payment. The troublesome notice requirement of U.C.C. § 2-607(3)(a) is modified to bar a buyer’s remedy only if the failure of such notice was prejudicial to the seller. The seller’s right to cure is clarified and made available after revocation of acceptance in merchant but not consumer contracts. A buyer’s reasonable use of goods after rejection or revocation of acceptance is not wrongful. Courts are encouraged to enforce contractual provisions allowing specific performance (U.C.C. § 2-716(1)) and the restitutionary rights of prepaying buyers (U.C.C. § 2-718(1)) are clarified. The statute of limitations (U.C.C. § 2-725) is clarified and extended to allow an action to be brought within four years of accrual or one year after the breach should have been discovered by no more than five years after accrual. Amended U.C.C. § 2-710 allows a seller to recover consequential damages, but not from a consumer buyer. There are new definitions and language changes including the pervasive effort to achieve gender-neutral language.

198. UCITA has been adopted with hesitation and qualification in two states, Virginia and Maryland, and confronted opposition in other states. See Brian D. McDonald, *The Uniform Computer Information Transactions Act*, 16 Berkeley Tech. L.J. 461, 461 (2001).

199. Steven D. Smith, *Believing Like A Lawyer*, 40 B.C. L. Rev. 1041, 1092 (1999).

200. *Id.*

comprehensive state regulation to pursue certain societal results. Theorists seek to impose their idiosyncratic views on a process that is necessarily eclectic and administered by heterogeneous decision-makers who are largely committed to an unscientific and untheoretical methodology often called *practical legal reasoning*.²⁰¹

"[L]egal reasoning does not function according to a purely deductive model. Rather, it functions more like a coherence theory or as a theory of practical reasoning from ends to appropriate means."²⁰² Judge Richard Posner recognizes that a logical positivist would deny that any proposition that is neither analytic nor verifiable can have any truth value, but he disagrees: "'[P]ractical reason'—a grab bag of reasoning methods that includes deliberation, interpretation, reliance on authority, tacit knowledge, and much else besides—can be used to establish the truth of many propositions with a reasonable (sometimes a very high degree) of certainty."²⁰³

Practical legal reasoning incorporates logic but is not controlled by the syllogism that requires complete faith in the premises. It recognizes the importance of "principle" but rejects the foundationalist view that norms can be deduced from a single unifying principle. Similarly, it respects "rules" but rejects the formalist view that the "correct" result can simply be deduced from the rules.²⁰⁴ Practical reasoning judges pay deference to precedent as authorities and analogies but they know that they are not compelled to decide exclusively by precedent except in rare situations.²⁰⁵ *Stare decisis* is not the exclusive value. When confronted with the interpretation of a contract or statute, judges are not pure textualists because they cannot avoid entirely the kind of *purposive* interpretation that obsessed Llewellyn.²⁰⁶ While there are still too many examples of an insecure

201. For discussions of "practical reasoning," see Smith, *supra* note 199. See also Steven J. Burton, *Law As Practical Reason*, 62 S. Cal. L. Rev. 747 (1989); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism and the Rule of Law*, 45 Vand. L. Rev. 533 (1992); Linda Ross Meyer, *Is Practical Reason Mindless?* 86 Geo. L.J. 647 (1998); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 Mich. L. Rev. 827 (1988).

202. Stick, *supra* note 23, at 350.

203. Posner, *supra* note 201, at 890-91.

204. See Farber, *supra* note 201, at 539.

205. See Posner, *supra* note 201, at 845.

206. U.C.C. § 1-102(1) ("This Act shall be liberally construed and applied to promote its underlying purposes and policies."); U.C.C. § 1-102 cmt. 1 ("The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved."); see Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. Pa. L. Rev. 795 (1978). But see Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. Colo. L. Rev. 541, 564-72 (2000) (suggesting some evidence of a retreat from Llewellyn's purposive direction to a more textualist judicial perspective).

judge manifesting a “plain meaning” bent, it has become infinitely more difficult to avoid the truth, as suggested in Corbin’s crushing insight:

It is sometimes said, in a case in which the written words seem plain and clear and unambiguous, that the words are not subject to interpretation or construction. One who makes this statement has of necessity already given the words an interpretation—the one that is to him plain and clear; and in making the statement he is asserting that any different interpretation is “perverted” and untrue.²⁰⁷

Judges using practical reason know that their engagement with the “surrounding circumstances” does not rise to the level of systematic empirical inquiry because the parties have neither the time nor resources to provide it, and even with sufficient time and resources, complete data would be undiscoverable.²⁰⁸ The formalist notion that judges should not be permitted to consider necessarily incomplete empirical observations, however, suggests a monistic and dangerous approach. While practical legal reasoning includes judicial intuition that guards against outrageous results, Llewellyn did not advocate ad hoc judicial decision making and neither do contemporary judges. While emphatically refusing to “sanctify” judges,²⁰⁹ he not only demonstrated his understanding of the judicial process but his respect for it.

“Safe harbors,” standardized terms and other formalistic devices create an illusion of certainty that can foster manifest injustice. The formalist “implicit assumption that courts function well when they operate within tightly constrained, formal modes of analysis”²¹⁰ is unwarranted. A critical and pervasive feature of the judicial process is totally ignored by the formalist—the compulsion to administer justice between the parties before the court within recognizable legal standards.²¹¹ Practical legal reasoning may be described as a rough sense of justice that does not admit of precise empirical verification. It is, however, a reality promoting an underlying value that continuously competes with the values of certainty and predictability. No matter how clear the language of a standardized term created by a lawyer drafting “to the absolute limit of what the law can conceivably

207. Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L.Q. 161, 171-72 (1965). See the opinion by Justice Roger Traynor in *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968). See also *Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001 (3d Cir. 1980).

208. See Posner, *supra* note 201, at 836.

209. See Llewellyn, *supra* note 101.

210. Scott, *supra* note 107, at 875-76.

211. “[I]f these modern jurisprudes are forgetting that the goal of law is justice, and forgetting also that judges and other officials must not be free to be arbitrary, then they need correction at once and, if need be, with a club.” Karl N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* 152 (1962).

bear,"²¹² and no matter how carefully the drafted clause tracks a safe harbor, "[w]hen it gets too stiff to make sense, then the court may knock it over."²¹³ To avoid unfair surprise and oppression under formal constraints, courts would again resort to "covert tools" that promote unnecessary confusion and unpredictability. It is not enough to characterize the prescriptions of the formalists as unrealistic and misguided. Because of the proclivity of courts to favor certainty and predictability, unlike the other theories, formalism constitutes a clear and present danger in contract theory.

Current theorists are not satisfied with the fact that "the judge is trying to reach the most reasonable results in the circumstances (which include but are not limited to the facts of the case and to legal doctrines)."²¹⁴ Such a theory does not augur the kind of analysis that a dilettante would find inviting. No legal scholar should have to be reminded of the Aristotelian truth that one should not expect as much certainty from law as one expects from physics. There are opinions that are beautiful, such as those pedagogical efforts that "let us 'see' the law in a way that 'fits,'" opinions that "ring true" and "look right."²¹⁵ They penetrate a maze of pedestrian precedent to unearth a principle that allows the development of doctrine.²¹⁶ There are ugly opinions, most of which reek of excessive formalism, and the remainder fall somewhere on the spectrum. Those that escape the

212. Hearings, *supra* note 46, at 113 (statement of Karl Llewellyn). For an elaboration of this thought, see Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173, 1205 (1983).

213. Hearings, *supra* note 46, at 114 (statement of Karl Llewellyn).

214. Posner, *supra* note 201, at 862.

215. See Meyer, *supra* note 201, at 666.

216. Obvious illustrations in contract law are the products of Judge Benjamin Nathan Cardozo during his tenure on the New York Court of Appeals. Karl Llewellyn characterized such judging in the grand tradition in his description of Cardozo's opinion in the classic case of *McPherson v. Buick*:

See what he did. It is so simple. It is so grand . . . [H]e set up a significant type-situation: consumer-purchase in a community which has to rely on increasingly un-understandable basic technology. That typical situation, seen that way, stepped up the aspect of reliance and stepped down the aspect of fault . . . What the opinion does is to *feel* that picture. Indeed, it is not the job of a great judge to get fully explicit, all at once, about great social change. His job is to *feel* what he can, and to *see* what he can, and to *say* what he can. But his *method* has to be *reach, first*, for the significant type-situation. Then, to diagnose a problem, and to prescribe an answer accompanied by an explicit life-reason: this not only helps toward a good answer, but it is also priceless in affording easy wherewithal for tomorrow's intelligent application, or else for tomorrow's explicit correction, whichever tomorrow's case may prove to need.

Llewellyn, *supra* note 211, at 223; see also Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 Wm. & Mary L. Rev. 1379, 1381 (1995) (stating that Cardozo "was at once master of the incremental evolution of the common law and servant of the imperative to adapt law to the needs of those it governs, evincing in his contracts opinions a fluid sense of doctrine and an animating principle of justice broadly conceived").

“ugly” may be called “pedestrian” or “workmanlike” while those that approach the “beautiful” are “sound.” The fact that judges and scholars can weigh their intrinsic value evidences the unique character of the practical legal reasoning process.²¹⁷ Practical legal reasoning is an empirically verified fact that Llewellyn clearly understood and for which he had complete empathy. Modern theorists, however, are unwilling to accept the fact of such an imperfect process.²¹⁸ All of their protestations about the indeterminateness and unrealistic nature of doctrine ignore this empirically verified process. They also ignore the incontestable fact that, with all of its imperfections and limitations, the process works. The aspiration for absolutely “correct” results surrenders to the reality that the actual results are more often than not as correct as any imperfect adjudicative institution can make them and, on occasion, their “correctness” is profound: There are always new opinions that approach the “beautiful” and some will eventually be recognized as “landmark.”²¹⁹ Llewellyn’s “new” contract law, now a half century old, had a dramatic effect on the refinement of doctrine. The difficulty experienced in the historic, decade-long failure to produce a revised Article 2 of the U.C.C. but to settle for some amendments that, with rare exception, are obvious, is not due exclusively to partisan views. It is also a tribute to the genius of Llewellyn.

CONCLUSION

Euphemistic neoclassicist reactions to the new theories are misunderstood and ineffective.²²⁰ The product of the CLS scholars,

217. While recognizing this process, Judge Posner would not agree that there is anything unique about it. He sees nothing special about practical reasoning used by judges as contrasted with the practical reasoning of everyday life. See Posner, *supra* note 201. Not everyone, however, thinks about everyday life as does Judge Posner. It may not be special for him, but it is special for the rest of us. In a review of his latest book (at least, at the time of this writing), *Public Intellectuals: A Study in Decline*, David Brooks suggests that Posner “publishes a new book more or less after every meal.” David Brooks, *Notes From a Hanging Judge*, N.Y. Times, Jan. 13, 2002, § 7, at 9.

218. While economic theory can provide valuable insights, by now, even Judge Posner must be convinced that it will never dominate the legal process. His proclivity, however, continues. In the review of his latest book, David Brooks laments Posner’s economic analysis of intellectual output. “And so watching Posner try to apply economic laws to public debate is a bit like watching a Martian trying to use statistics to explain a senior prom . . . [H]e’s missing the fraught complexity of the thing.” Brooks, *supra* note 217, at 9.

219. In the preparation of the fifth edition of my cases and materials on contracts (2000), I was particularly taken with the vitality of the process that has recently produced a large number of excellent “pedagogical” opinions (including those of Judge Posner) that manifest a clear understanding of the history of doctrine, its development in recent years and its refinement and extension to modern issues.

220. See, e.g., Robert A. Hillman, *The Richness of Contract Law: An Analysis and Critique of Contemporary Theories of Contract Law* (1997). In reflecting on the presentations on the teaching of Contract law at an AALS Conference, Professor

relationists and empiricists as currently presented may continue to be regarded as nothing more than sounding brass and tinkling cymbals. A considerable portion of law and economics scholarship may share a similar fate. In the words of a prominent judge, "I say to myself, there just *has* be something here for all the rest of us. I just can't seem to find it."²²¹ The deliberate failure to suggest practical reasoning that would assist courts in a continuous progression of extended and refined analyses of contract doctrine suggests an abdication of responsibility. In creating products that are useless to courts and practitioners while promoting their scorn, they unwittingly invite a reactionary formalism in contract theory. The desideratum of discovering wisdom from other disciplines is frustrated when the expertise of its presenters is questionable and its product is often delivered in a form that is not only obtuse but destructively critical and philotyrranical in its demand that the current system lacks any redeeming virtue.²²² Moreover, the inability to suggest meaningful substitutes is not simply a theoretical mistake, it is a moral failing.²²³

Formalists are eager to fill this void. They would create a world of "plain meaning" interpretation, ridding the adjudication of contract disputes of any evidence unexpressed in words, reinstating a draconian parol evidence rule, and even precluding the parties themselves from modifying their contract or waiving one or more terms in any fashion other than express terms. Contracts would be filled with legislatively mandated "safe harbors" that would insure the enforceability of terms dictated by parties with superior bargaining power. Enforceability would be determined exclusively by adherence to formula words to promote some model of efficiency that allegedly omniscient decision makers decided rational parties ought to pursue, regardless of other manifestations of intention. Any danger in the approaches of other theories pales by comparison to the clear and present danger of a return to formalism in its new bottle. While it

Grant Gilmore stated,

[O]ne thing that has saddened me has been the truly extraordinary kindness and courtesy that the panelists have shown to each other. When A finished his remarks, B would arise and say, "I agree with every word that my learned brother and dear friend has said. No one could improve on his presentation . . ." Now what I would like to see is that B, when A has finished his piece, would get up and turn to his opponent and say, "You, sir, are a scoundrel, and what is more, you are a lily-livered paltroon, a disgrace to the noble profession of teaching Contracts." At that point, things might begin to get interesting.

Gilmore, *quoted in* Kelso, *supra* note 18, at 639-40.

221. With respect to CLS, Judge Judith Kaye states: "The movement has scholarly books, scholarly articles, annual conferences and a seemingly glowing following in academic circles. These facts give me real pause. I say to myself, there just *has* to be something here for all the rest of us. I just can't seem to find it." Kaye, *supra* note 31, at 266.

222. See Gordon, *supra* note 2.

223. See Nozick, *supra* note 30.

may be no more difficult intellectually to dismiss this extremist position as it is to dismiss extremist CLS theory, the brooding omnipresence of formalism cannot be ignored.²²⁴ Even its remnants can have a corrosive effect on the effort to pursue a continuous expansion and refinement of contract doctrine.

Neoclassicists do not deny the imperfections of the current system and judicial vision. Nor do they deny the potential contributions of the relationists, empiricists and economists. The insuperable obstacles are their insistence that they have discovered unitary truth, their corresponding rejection of on-going neoclassical theory that prevails in the real world, and their failure to provide even hints of functional substitutes in an ambience of practical judicial reasoning. Indeed, neoclassical theory is in the forefront of the war against formalism, but unlike the others, neoclassicists believe the war must be won, and more articles about meta-theory that despair over the inadequacies of current theory will not win it. Llewellyn's aspiration of a more decent, conscionable, good faith contracts society is necessarily a work in progress. In a world where courts can decide whether a breach is material or immaterial, whether performance is substantial or insubstantial, whether conduct is reasonable or unreasonable, and whether injustice can only be avoided by the enforcement of a promise, it is not enough to reject a mandate such as unconscionability, good faith or other Llewellynesque standards or "leeways" as fatally vague. As judges traverse these gray areas, the academic bar has a distinct obligation to assist the process—"if not turning the grays into black and white, at least making the shade of gray more discernible."²²⁵ Whatever deficiencies lie in the vagaries of Llewellyn's efforts, there can be no reasonable doubt about his underlying purpose. Neoclassicists feel obliged to pursue a realistic scholarly dimension that will assist courts in the fulfillment of that purpose.

224. There is evidence of a return to formalism in the case law. See Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 Or. L. Rev. 1131 (1995). There is also evidence of a developing textualist approach that would ignore the implied duties of good faith and fair dealing in relation to express terms. See Michael P. Van Alstine, *Textualism, Party Autonomy and Good Faith*, 40 Wm. & Mary L. Rev. 1223 (1999).

225. Ripple, *supra* note 81, at 431. It is interesting to note that while the new theories produced virtually no case law citations over the last thirty years, what may be the most famous law review article in American legal history consisting of twenty-eight pages and limited footnotes published in 1890 was cited more than two hundred times and over 900 times in the law reviews during the same period. Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

Notes & Observations